IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. [redacted]

SNAKE CREEK MINING AND TUNNEL COMPANY, a Corporation, Petitioner,

vs.

MIDWAY IRRIGATION COMPANY, a Corporation, and WILLARD VAN WAGENEN, Respondents.

## MOTION

For Leave to Submit Supplemental or Amended Opinion in Behalf of the American Mining Congress, Corporation, and Brief Statement of Reasons why Consideration to the Highly Important Issue of the Validity of the Adverse Ruling of the Supreme Court of Appeals in This Case With Respect to the Ownership of Percolating Waters.

Submitted by

A. F. DALLEBRETH,
By Amicus Curiae.

IN THE

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1920.**

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## No. 880.

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SNAKE CREEK MINING AND TUNNEL COMPANY, A CORPORATION, PETITIONER,

*vs.*

MIDWAY IRRIGATION COMPANY, A CORPORATION, AND WILFORD VAN WAGENEN, RESPONDENTS.

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**MOTION.**

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Comes now J. F. Callbreath, and showing to the court that he appears herein as counsel for the American Mining Congress, a corporation organized for the purpose of promoting the welfare of those engaged in the mining industry, states that the decision of the Circuit Court of Appeals in this case affects the interests generally of persons and corporations engaged in such industry in all sections of the country where water is used for irrigation purposes; that said decision is a radical departure from the rule of decision which has

hitherto prevailed with reference to the ownership of percolating waters encountered and developed as an incident to certain mining operations.

Wherefore said J. F. Callbreath hereby moves the court for leave to submit as *amicus curiæ* the following suggestions in support of the petition for a writ of certiorari herein.

J. F. CALLBREATH,
*As Amicus Curiæ.*

## SUGGESTIONS

### Concerning the Importance to the Mining Industry of the Decision of the Circuit Court of Appeals Herein.

The American Mining Congress is a non-profit corporation organized to promote the welfare and to advance the interests of individuals and corporations engaged in the various branches of the mining industry throughout the United States. It has no pecuniary interest whatever in this litigation and is only interested in the questions decided by the Circuit Court of Appeals and in the consequences of such decision as they affect the mining industry.

The facts of the case being fully and accurately stated in petitioner's brief, it is believed to be unnecessary to repeat them here or to make any further reference to them other than to say that the waters in question were conclusively shown to be percolating waters encountered and developed by petitioner by means of a tunnel driven by it into a mountain in the State of Utah, in the vicinity of which mountain flowed a surface stream whose waters had been appropriated for beneficial purposes by the respondent Midway Irrigation Company.

The District Court decreed that the petitioner was the owner of the waters so developed by it, but this decree was by the Circuit Court of Appeals reversed, and the right to the usufruct of said waters was awarded to said respondent.

At the time said percolating waters were collected by means of petitioner's tunnel the statutory law of the State of Utah provided, and the decisions of the court of last resort of said State uniformly held, that percolating waters developed by means of a tunnel became the property of the owner of the tunnel in accordance with the rule at common law.

**The Great Public Importance of the Questions Involved.**

The necessary result of the decision of the Circuit Court of Appeals is to affirm the contention that the appropriators of the waters of a certain stream acquire an easement in the lands through which these waters percolate before they reach the surface and that such appropriators have the right to insist that such percolating waters may not be intercepted in such manner as to divert them from the surface stream. It is submitted that such ruling, if generally adopted, would very greatly injure the mining industry and retard, if not prevent, mining development in certain sections of the country. See *Crescent Mining Company v. Silver King Mining Company*, 17 Utah, 444, at page 452.

The waters secured as an incident to the construction of tunnels and other underground excavations in connection with mining operations are often of great value and constitute an important item in estimating the feasibility of such improvements. For instance, in the instant case the waters in controversy are valued at more than $40,000. Further-

more, it frequently happens that mining operations cannot be carried on at all until the mines or mining properties are drained. It also frequently happens that percolating waters when collected and conveyed to the surface in these mining operations cannot be delivered into the streams of which they are conceived to be the source of supply.

Under the rule adopted by the Circuit Court of Appeals this character of diversion of underground percolating waters would constitute an invasion of the rights of such appropriators of the waters of the surface streams which ordinarily would be attended with such irreparable consequences as to entitle the injured party to an injunction. The inevitable result of this would be to put a stop to the mining operations concerned.

In this connection I desire to adopt and to respectfully urge the points discussed at pages 51 to 63, both inclusive, of petitioner's brief.

Respectfully submitted,

J. F. CALLBREATH,
*As Amicus Curiæ.*

IN THE

October Term, 1922

SNAKE CREEK MINING AND TUNNEL COMPANY, a Corporation,

Petitioner,

vs.

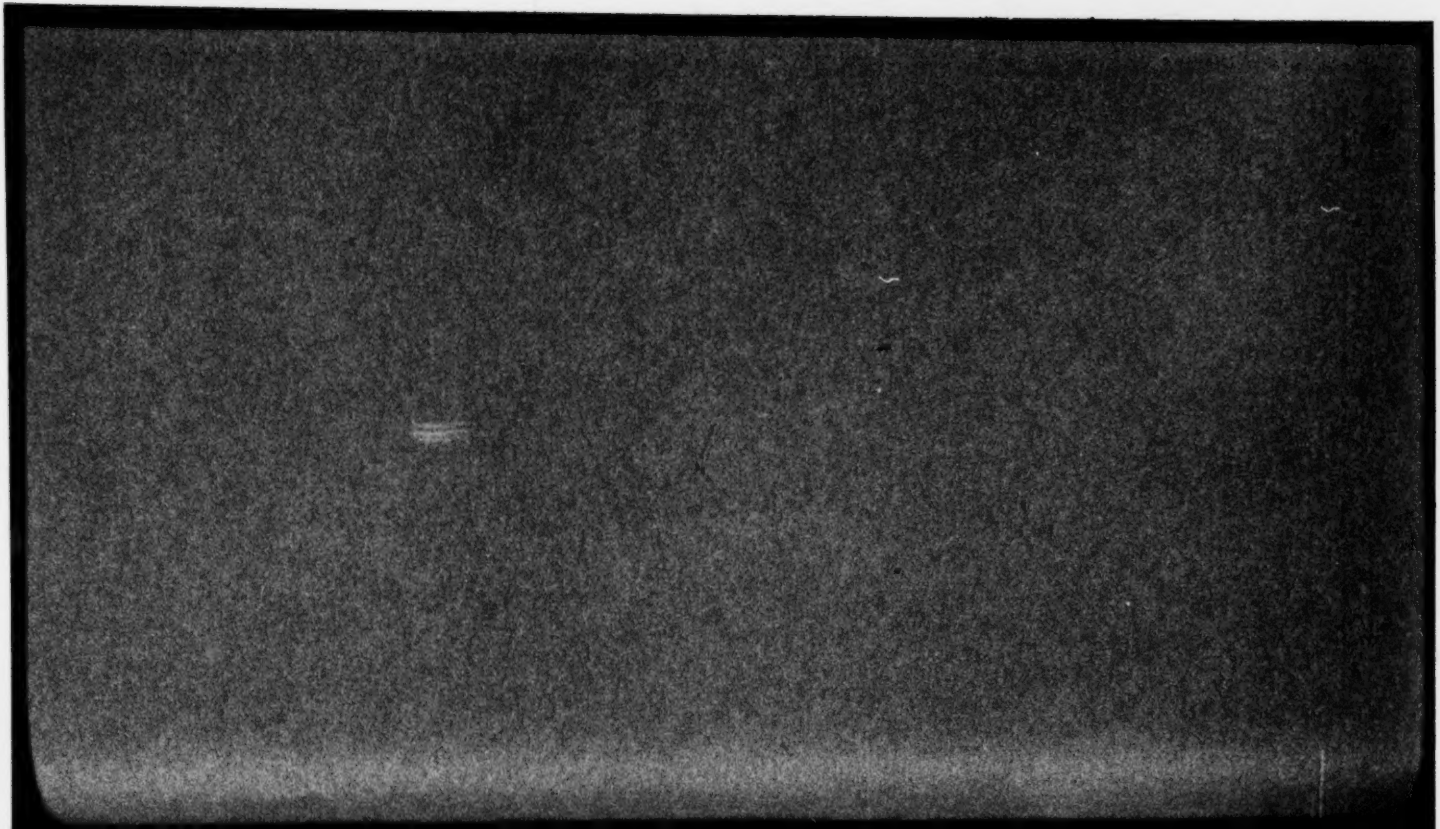
No. 382

MIDWAY IRRIGATION COMPANY, a Corporation, and WILFORD VAN WAGENEN,

Respondents.

PETITION OF SALT LAKE CITY, A MUNICIPAL CORPORATION OF THE STATE OF UTAH, FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

WILLIAM H. FOLLAND,
City Attorney for Salt Lake City.



# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1922

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| SNAKE CREEK MINING AND TUNNEL COMPANY, a Corporation, Petitioner, vs. MIDWAY IRRIGATION COMPANY, a Corporation, and WILFORD VAN WAGENEN, Respondents. | } | No. 302 |

## PETITION OF SALT LAKE CITY, A MUNICIPAL CORPORATION OF THE STATE OF UTAH, FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

WILLIAM H. FOLLAND,
City Attorney for Salt Lake City.

## PETITION OF SALT LAKE CITY, A MUNICIPAL CORPORATION OF UTAH, FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Your Petitioner, Salt Lake City, a Municipal Corporation of the State of Utah, respectfully represents that said city owns, controls and operates its waterworks system for the use and benefit of the inhabitants thereof; that nearly all of its water supply for culinary and domestic use by the inhabitants of said city and for all municipal purposes is derived from mountain streams flowing from the canyons in the near vicinity of said city; that a large number of mine locations and claims, upon which work has been and still is carried on, are located within a portion of the water-shed of said city; and that numerous tunnels have been and are being driven into the mountain sides and percolating waters encountered therein within said water-shed, and said city therefore is vitally interested in the questions presented to this Honorable Court for determination in the above entitled case.

Your Petitioner, therefore, prays that it may be allowed to appear as *amicus curiae* and file a printed brief, a copy of which is submitted herewith, and further that its counsel may be allowed to participate briefly in the oral argument herein.

The nature of Petitioner's interest and grounds upon which this petition are based are more fully set forth in paragraphs I and II of said brief to which the consideration of the court is hereby invited.

SALT LAKE CITY, a Municipal Corporation,
By WILLIAM H. FOLLAND, City Attorney.

# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1922

SNAKE CREEK MINING AND TUNNEL COMPANY, a Corporation,
Petitioner,
vs.
MIDWAY IRRIGATION COMPANY, a Corporation, and WILFORD VAN WAGENEN,
Respondents.

No. [illegible]68

## BRIEF ON BEHALF OF SALT LAKE CITY, A MUNICIPAL CORPORATION OF THE STATE OF UTAH, SUBMITTED AS AMICUS CURIAE

WILLIAM H. FOLLAND,
City Attorney for Salt Lake City.

GEORGE SUTHERLAND, of Counsel.

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# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1922

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| SNAKE CREEK MINING AND TUNNEL COMPANY, a Corporation, Petitioner, vs. MIDWAY IRRIGATION COMPANY, a Corporation, and WILFORD VAN WAGENEN, Respondents. | No. 302 |

## BRIEF ON BEHALF OF SALT LAKE CITY, STATE OF UTAH, SUBMITTED AS AMICUS CURIAE.

Salt Lake City is vitally concerned in the questions presented to this Honorable Court for determination in the above entitled cause, and therefore, with leave of this Court, submits the following brief as amicus curiae.

## I.

## THE QUESTION INVOLVED

The petitioner is a mining company, which in the course of its operations has constructed a tunnel extending into and underneath certain mountain lands for a length of several thousand feet. In the course of the tunnel water has been encountered at various points, the aggregate volume of which flowing from the portal of the tunnel is stated to be 6454 gallons per minute. The claim of the respondents is that long prior to the driving of this tunnel they had appropriated all the waters of a certain stream called Snake Creek, and that by the construction of said tunnel the plaintiff had intercepted the subterranean waters which formed a part of the natural supply of Snake Creek, and that this resulted in diminishing the waters which they had theretofore appropriated. The principal question which is, therefore, presented for determination by this Court is, whether the petitioner by virtue of its ownership of the tunnel is the owner of the percolating waters collected therein, even though the effect be to diminish the supply theretofore appropriated by the respondents. It is the contention of petitioner, first, that such is the rule of the common law, and, second, that this rule of the common law has been adopted by the decisions of the courts of the State of Utah and that the Federal courts are bound to follow these decisions.

## II.

## THE DECISION IN THIS CASE WILL CONSTITUTE A PRECEDENT PROFOUNDLY AFFECTING THE INTERESTS OF SALT LAKE CITY.

Salt Lake City has a population of about one hundred and twenty thousand. The water supply for this population is derived from mountain streams flowing from the canyons of the near vicinity. It is common knowledge that the waters constituting these streams come from the rains and melting snows which fall upon the mountain sides at higher elevations and which percolate through the soil and rocks, and subsequently appear at the surface in the form of seeps and springs. A shortage in the quantity of precipitation for any considerable period results in diminishing the volume of these streams. This is a matter of common observation and demonstrates the absolute dependence of the streams for their supply upon the percolating waters. Hence, to interfere with these percolating waters is to interfere with the streams themselves. The two stand to each other in the relation of cause and effect.

Above the City of Salt Lake and along the canyons and upon the mountain sides which constitute a portion of the watershed from which the water supply of the City is derived there has existed for many years a large number of mining locations and claims, upon which work has been and still is being actively carried on. In the prosecution of this work numerous tunnels have been and are being driven into the mountain sides and percolating waters encountered. These are facts of common knowledge, and are borne out by the maps, surveys and

reports of the United States Geological Survey. These percolating waters so encountered bear to the streams of water appropriated by Salt Lake precisely the same relation as the waters encountered by the petitioner's tunnel bear to the waters of Snake Creek. The waters thus appropriated and distributed by the City of Salt Lake for the use of its inhabitants originate in the rains and snows falling upon the higher levels and finding their way by a process of gradual percolation through the soil and rocks into the appropriated streams. All the waters of these streams has long since been appropriated and put to a beneficial use.

The vital interest, therefore, of Salt Lake City in this case is apparent. If the rule be established that the owner of a mining claim in the mountains beneath whose surface these waters gather and percolate, may, by means of tunnels or other openings, intercept and appropriate these waters for commercial purposes, the result will be to gradually deplete municipal supply for domestic use, and this in time will prove disastrous. The rule announced by the Circuit Court of Appeals in the instant case recognizes and enforces the superior right of the prior appropriator of the waters for a beneficial use, and at the same time imposes no unjust restriction upon the mining industry, since it does not deny the right of the mine owner to utilize such water as may be necessary for mining purposes. The decision does not in any manner threaten the mining industry nor does it interfere with the right of the mine owner to dig such tunnels and make such excavations as he pleases in the prosecution of his mining operations. It only requires that he shall permit such waters as he

discloses and diverts from their original sources to flow to their original appropriator, except insofar as their use may be required for his own operations. In other words, he is forbidden to *commercialize*—to appropriate for sale to others—but he is not forbidden to *use*, the waters. Such use, of course, must be subject to the controlling direction of a court of equity under the doctrine of reasonable and correlative use. Thus the rights of the original appropriators and the rights of the mine owner are both recognized and may be exercised without interference with one another.

## III.

## NATIONAL AND STATE POLICY IN RESPECT OF MINING AND WATER RIGHTS.

One of the grounds asserted by the petitioner in its application to this Court for a writ of certiorari is, that the decision of the lower Court "will result in prohibiting the opening and working of unappropriated mineral lands * * * as well as mineral lands owned by private interests * * *." If this contention were correct, it would call for the most serious consideration. The mining industry is a most important one. So far as the State of Utah is concerned, it may be conceded that it is only less important than agriculture, but it is obviously less important than the latter industry in the precise degree that food is more important than gold and silver and copper and lead. The National Government, from the time of the discovery of gold in California, has by its legislation manifested a desire to encourage and foster the development of the mineral resources of the far West. It has not less strongly

recognized the right of the people to appropriate waters found upon the public domain for beneficial uses. Indeed, the two policies are based upon similar reasons and have developed substantially with the same historic background. Mr. Justice Field, in the case of *Jennison* v. *Kirk*, 98 U. S. 453, shows the close relationship of the two in the following language:

> "By the customary law of miners in California, as we understand it, the owner of a mining claim and the owner of a water right enjoy their respective properties from the dates of their appropriation, the first in time being the first in right; but where both rights can be enjoyed without interference with or material impairment of each other, the enjoyment of both is allowed."

The decision of the Circuit Court of Appeals in the instant case recognizes this principle and enforces it. On the one hand, the right of the original appropriator to the continued use of the water for irrigation purposes and, on the other hand, the right of the mining company to use such part of the water as may be necessary for operating its mines are both recognized and confirmed. Thus, the National policy with reference to both industries is vindicated. It should be borne in mind that the object of the mine owner is to discover and appropriate mineral substances, and not to develop and appropriate the water found in the earth. The right to acquire, and consequently the right to develop a mine on the public lands of the United States necessarily depend upon a previous discovery of mineral and can not rest upon anything else. While it may be true that having once acquired title upon the basis of the mineral discovery, the title is complete and carries with

it all the incidents which usually attach to the ownership of land, it is certainly true that no title could be initiated or acquired which was made to rest merely upon the existence of water underneath the surface, or upon the mere purpose to develop and appropriate such water for sale or otherwise. To allow the mine owner, therefore, to appropriate the mineral substances, but deny him the right to appropriate *for sale to others,* the waters found beneath the surface, where this interferes with the supply of a prior appropriator, is in reality to carry out the fundamental policy of the Federal mining laws under which his rights are acquired and by which they must be measured.

It will not be disputed that the right to appropriate water for any beneficial use within the State of Utah is a right which exists under and by virtue of the laws of the State, and that the extent and rank of the right so acquired are to be measured by these laws. It is settled law in the State of Utah as it is in most of the arid land States, that the common law doctrine of riparian rights is not in force because not applicable to local conditions, but that the right to the use of water rests entirely upon appropriation for a beneficial purpose. An appropriation may, therefore, be made for domestic uses, for the irrigation of lands, for mining purposes, as well as others, but under the policy of the State, as evidenced by its legislation, these uses have different preferential values. For example, Section 2787 s 14, Compiled Laws of Utah, 1888, provides:

> "Whenever the waters of any natural source of supply are not sufficient for the service of all those having primary rights to the use of the same, such water shall be distributed to each owner of such

> right in proportion to its extent, but those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for irrigating lands shall have preference over those using the same for any other purpose, except domestic purposes; provided, such preference shall not be exercised to the injury of any vested right, without just compensation for such injury."

And Section 3472, Compiled Laws of Utah, 1917, contains the following provision:

> "But in times of scarcity, while priority of appropriation shall give the better right as between those using water for the same purpose, the use for domestic purposes shall have preference over use for all other purposes, and use for agricultural purposes shall have preference over use for any other purpose except domestic use."

By this legislation the public policy of the State of Utah, so far as the questions here involved are concerned, is made clear to the effect that the several uses to which the waters of the State may be put are to be preferred in the following order: (1) for domestic purposes; (2) for agricultural purposes; and (3) for mining purposes. The use to which the water is put by the inhabitants of the City of Salt Lake is, of course, primarily of the first class, and it, therefore, takes first rank.

The policy and importance of preserving the water supply of this City is not only recognized by this general legislation of the State, but it has been also especially recognized by the Congress of the United States. By an Act approved September 19, 1914, being "an act for the protection of the water supply of the City of

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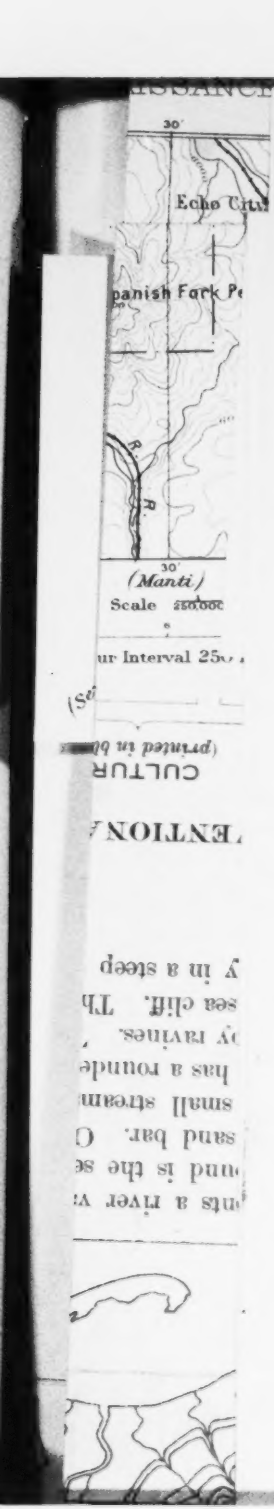


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Salt Lake City, Utah," a large body of public lands covering many square miles lying in the mountains adjacent to the City are "reserved from all forms of location, entry, or appropriation, whether under the *mineral* or nonmineral land laws of the United States and set aside as a municipal water supply reserve for the use and benefit" of that City. These lands under the act are to be administered by the Secretary of Agriculture in cooperation with the City for the purpose, among others, of conserving the water supply.

We submit that a rule, which, while allowing the mine owners to work their property in every proper way and to appropriate and use such portion of the water encountered in their operations as may be necessary for mining purposes, denies their right to appropriate to the injury of a prior appropriator any of such water for sale to others, accords with sound public policy, both State and National, and concedes to the mining industry everything which that policy as well as justice requires.

(There is attached hereto a map prepared by the United States Geological Survey, upon which we have drawn an outline of the mining districts referred to on pages 5, 6 and 10 ante, whose areas include the head waters and upper portions of some of the streams upon which the City depends for its water supply, and also an outline of the lands withdrawn under the Act of Congress of September 19, 1914).

## IV.

## THE "AMERICAN RULE" SHOULD BE FOLLOWED IN THE INSTANT CASE AS MOST SUITED TO CLIMATIC AND LOCAL CONDITIONS.

Petitioner has assumed, without discussion, that the common law rule is to the effect that percolating water belongs to the owner of the soil and that he may appropriate it for whatever purpose he pleases without regard to the effect upon a prior appropriator. It is true that there are some American cases which justify this assumption, and likewise true that the earlier decisions in the State of Utah seem to give it support, although these earlier decisions, as pointed out by the lower Court, are far from being definite or harmonious. Before coming to an analysis and discussion of the Utah cases, it will prove not unprofitable, we think, to discuss briefly the state of the law generally upon this subject.

In the first place, an examination historically of the matter will demonstrate, we think, that there is no definite common law rule in the United States on the subject. Up to the time of the American Revolution, the question had never received the consideration of the English courts or people. The first decision was not until 1840, and it was not until 1860 that the rule was announced recognizing the right of the owner of the soil to utilize the percolating water contained therein for commercial purposes. See 64 L. R. A. 237, Note. At the time of the American Revolution, therefore, it can not be said that there was any settled rule of the common law in the matter which could have been adopted by our ancestors. To be sure, the decisions of the

Courts of England rendered since the Revolution, and even in recent years, which announce common law principles, are entitled to respect, but they are not authoritative as are such decisions rendered prior to the Revolution.

*Cathcart* v. *Robinson*, 5 Peters, 264.

It has been said, however, that the so-called common law rule of riparian rights was adopted in this country from France, and not from England. Samuel C. Weil, in an article in Harvard Law Review, Volume 33, page 133, is authority for that statement and also the following:

> "At the beginning of the nineteenth century the law of watercourses in England was represented by the declaration of Blackstone that the first appropriator of a watercourse "hath by the first occupancy, acquired a property in the current," and by similar judicial declarations, continuing as late as 1831, when the Chief Justice of the Common Pleas ruled: "By the law of England, the person who first appropriates any part of the water flowing through his own land to his own use, has the right to the use of so much as he thus appropriates, against any other." "It all depends upon the priority of occupancy," was the declaration of the period in England.

Moreover, even if the rule of the common law be as assumed, it does not follow that it prevails in Utah, or, indeed, in any of the States of the Union, since the common law was never adopted in this country in its entirety, but only so much of it as was suited to our situation and condition.

*Van Ness* v. *Pacard,* 2 Peters, 137, 144.

The common law is not precisely the same in all of the States.

*Wheaton* v. *Peters,* 8 Peters, 658, 659.

Owing to differences in local conditions, certain rules of the common law are held to be in force in some States and denied applicability in others. During the time when the Western States were sparsely settled, it was, for example, held that the rule of the common law requiring the owner to keep his cattle upon his own premises, was inapplicable to a condition where there were large areas of unfenced grazing lands. Another illustration is found in the doctrine of the common law with reference to riparian rights. In England, the country of its origin, and in the older settled States where it was adopted, climatic conditions were such as to render the doctrine applicable, but in the arid land States of the West, where the rain fall was slight and in order to raise crops artificial irrigation was necessary, it was held at a very early date that the rule of the common was wholly abrogated. Indeed, it was said that this result was effected by the application of another and controlling maxim of the common law, *cessante ratione legis cessat ipsa lex.*

> "It is contrary to the spirit of the common law itself to apply a rule founded upon a particular reason to a law when that reason utterly fails."
>
> *Reno Smelting Works* v. *Stevenson,* 20 Nev. 269.

And this Court has said something of the same character in the *Hurtado* case, 110 U. S. 516, 531:

> "There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mold and shape it into new and not less useful forms."

Strictly speaking, however, the States of the Union are not divided between those who accept and those who reject the common law rule with reference to percolating waters, but what we have is a division between those who have adopted what is called the "American Rule" and those who have adopted what is called the "Engilsh rule." It is the former which was followed by the Circuit Court of Appeals in the instant case.

> "The rule generally adopted by, not only the courts of the arid states, but by most of the American courts, so that it may be said to be the American, as distinguished from the English rule, is that, while the owner of the land is entitled to appropriate subterranean or other waters accumulating on his land, which thereby become a part of the realty, he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land he owns, unconnected with the beneficial use of the land, especially if the exercise of such use in excess of the reasonable and beneficial use is injurious to others, who have substantial rights to the water." 271 Fed. 162, 163.

There follows a citation of numerous cases in support of the text. We shall not attempt to review and

discuss the decisions of the American Courts upon this question, in view of their full discussion in the very able brief for the respondents. We do, however, feel waranted in emphasizing two decisions in what may be regarded as the two leading American cases.

*Meeker* v. *East Orange,* 77 N. J. Law, 623, 25 L. R. A. (N. S.) 465.

*Katz* v. *Walkinshaw,* 141 Cal. 116, 64 L. R. A. 236.

The opinion in the first of these cases was rendered by Mr. Justice Pitney, then a member of the New Jersey Court. He reviews the English and American cases upon the subject, and points out the conflict among the American decisions, and says:

> "In the absence of any anciently established rule of the English common law upon the subject, and of any contrary decision in this court, and in view of what will shortly appear, that the decisions in other jurisdictions are conflicting with the trend of modern decisions in this country strongly in favor of adopting the doctrine of reasonable use, this court is at the present time open to decide the case at bar in accordance with sound reason and general principles of law and justice."

After a further discussion of American and English authorities, he points out that "most, if not all of these decisions would be equally justified under the doctrine of 'reasonable user, ". Referring to the English cases, he says:

> "A review of the reasoning upon which the English doctrine respecting percolating underground waters rests will demonstrate, as we think, that this reasoning is unsatisfactory in itself and

inconsistent with legal principles otherwise well established."

The opinion then points out that the English rule finally rests upon the maxim, *Cujus est solum, ejus est usque ad coslum et ad infernos,* and proceeds:

"Here the impracticability of applying the rule of absolute ownership to the fluid, water, which by reason of its nature is incapable of being subjected to such ownership, is apparently overlooked."

The conclusion of the learned Justice follows naturally from his preceding analysis, and we submit is entirely consistent with common sense and natural justice.

"Upon the whole, we are convinced, not only that the authority of the English cases is greatly weakened by the trend of modern decisions in this country, but that the reasoning upon which the doctrine of 'reasonable user' rests is better supported upon general principles of law and more in consonance with natural justice and equity. We therefore adopt the latter doctrine. This does not prevent the proper user by any landowner of the percolating waters subjacent to his soil in agriculture, manufacturing, irrigation, or otherwise; nor does it prevent any reasonable development of his land by mining or the like, although the underground water of neighboring proprietors may thus be interfered with or diverted; but it does prevent the withdrawal of underground waters for distribution or sale for uses not connected with any beneficial ownership or enjoyment of the land whence they are taken, if it thereby result that the owner of adjacent or neighboring land is interfered with in his right to the reasonable user of subsurface water upon his land, or if his wells,

springs, or streams are thereby materially diminished in flow, or his land is rendered so arid as to be less valuable for agriculture, pasturage, or other legitimate uses."

The other case referred to, *Katz* v. *Walkinshaw*, arose in the State of California. The question was elaborately argued upon the original hearing in the Supreme Court and re-argued upon rehearing. It was recognized as a case of the very first importance, was discussed not only by counsel representing the parties, but by lawyers of distinction appearing as *amici curiae*, with great learning and ability, as will be seen by reference to the briefs set forth in the volume of the Lawyers Reports Annotated where the case appears. Both upon the original hearing and the rehearing the Court was unanimous. We commend both opinions to the consideration of this Court, contenting ourselves with a few brief extracts, as follows:

"It is obvious at once that the analogy between the right to remove sand and gravel from the land for sale, and to remove and sell percolating water, is not perfect. If we suppose a saturated plain, one may remove and sell the sand and gravel from his land without affecting or diminishing the sand and gravel on the lands of his neighbors. If the water on his lands is his property, then the water in the soil of his neighbors is their property. But when he drains out and sells the water on his land, he draws to his land and also sells water which is the property of his neighbor."

* * *

"But the maxim, *Cujus est solum, ejus est usque ad infernos,* furnishes a rule of easy application, and saves a world of judicial worry in many cases.

> And perhaps in England and in our Eastern states a more thorough and minute consideration of the equities of parties may not often be required. The case is very different, however, in an arid country like southern California, where the relative importance of percolating water and water flowing in definite water courses is greatly changed."
>
> * * *
>
> "And what difference is there in destroying a stream or natural pond by drawing water from it through percolation, or by preventing it from flowing into the stream? The effect is the same, and knowledge of the inevitable effect of the act is the same."

The foregoing quotations are from the original opinion by Judge Temple. The opinion rendered after the rehearing by Judge Shaw and which is concurred in by the entire Court is a most able review of the question and is in complete accord with the original opinion.

V.

**THE ENGLISH RULE, BEING INAPPLICABLE TO THE LOCAL CONDITIONS IS NOT A PART OF THE COMMON LAW OF UTAH. THE DECISIONS OF THE COURTS OF THAT STATE, TAKEN AS A WHOLE, ARE TO THIS EFFECT.**

The principal contention made by petitioner is that the common law rule as interpreted by the English courts has been adopted both by the statutes of Utah and by the decisions of the courts of that State, and in the last analysis the case of petitioner must stand or fall upon this proposition.

Petitioner first quotes and relies upon the statute, which is as follows:

> "The common law of England, so far as it is not repugnant to, or in conflict with the Constitution and laws of the United States, or the Constitution and laws of this State, shall be the rule of decision in all courts of this State." Laws of Utah, 1917, Sec. 5838.

This statute is applied by petitioner as though it contained the further provision "whether the same be applicable to local conditions or not." It can not be supposed that the Legislature of the State of Utah, or of any other State, would adopt a rule of so sweeping and rigid a character. The effect of the statute is to adopt the principles of the common law only insofar as they are applicable. Precisely the same statute is to be found in California and in Nevada—in California with immaterial differences in words and in Nevada word for word. Cal. Pol. Code, Sec. 4468; Nevada Gen. Stats. Sec. 3021.

In *Katz* v. *Walkinshaw* supra, the same argument with reference to the statute was advanced as here, but the Court in its additional opinion by Judge Shaw said:

> "The idea that the doctrine contended for by the defendant is a part of the common law adopted by our statute, and beyond the power of the court to change or modify, is founded upon a misconception of the extent to which the common law is adopted by such statutory provisions, and a failure to observe some of the rules and principles of the common law itself."

In elucidation of this statement numerous authorities are cited and analyzed. Quoting from *Starr* v. *Child,* 20 Wend. 159, it is said:

> "It is contrary to the spirit of the common law itself to apply a rule founded on a particular reason to a case where that reason utterly fails."

And again the Court says:

> "In Pennsylvania and West Virginia, under similar statutes, it was held that only such parts of the common law as were applicable to the local situation of the particular state were in force (citing authorities), and this is the rule in all the states upon the question, irrespective of statutory adoption."

Again it is said, quoting from *Morgan* v. *King,* 30 Barb. 16:

> "The common law modifies its rules upon its own principles, and conforms them to the wants of the community, the nature, character, and capacity of the subject to which they are to be applied."

And adopting the language of the Court in *Beardsley* v. *Hartford,* 50 Conn. 542, it is said:

> "If the reasons on which a law rests are overborne by opposing reasons, which, in the progress of society, gain controlling force, the old law, though still good as an abstract principle, and good in its application to some circumstances, must cease to apply or to be a controlling principle to the new circumstances."

And finally the rule is announced that whenever owing to the physical features and character and the peculiarities of climate, soil and productions of the State, the application of a given common law rule tends constantly to cause injustice and wrong, fundamental principles require that a different rule should be adopted. The Court then goes on to state the conditions in Cali-

fornia as to climate, soil, etc., which render the rule of the common law in question inapplicable. Without repeating what the Court says in that respect, it is sufficient to say that the conditions pointed out are substantially paralleled in the State of Utah. In *Reno Smelting Works* v. *Stevenson,* 20 Nev. 269, 19 Amer. State Rep. 364, speaking of a statute in identical terms with that of the Utah statute, the Court said:

> "The statute is silent upon the subject of the applicability of the common law, but we think the term 'common law of England' was employed in the sense in which it is generally understood in this country, and that the intention of the legislature was to adopt only so much of it as was applicable to our condition. An examination of the authorities will render this apparent."

We submit, therefore, that the reliance placed by petitioner upon the terms of the Utah statute is without foundation.

In addition to this, however, it is urged that the rule of the common law as interpreted by petitioner has been adopted by the decisions of the State Courts, and that this rule is binding upon the Federal Courts. The Circuit Court of Appeals in deciding the instant case has met and exposed the fallacy of this contention. A similar contention was made in the case of *Katz* v. *Walkinshaw,* supra. An examination of the decisions of California, as reviewed by Judge Shaw in that case, will disclose a striking parallel between the situation in California and that in Utah with respect to the court decisions. Judge Shaw began his review by saying:

> "The decisions have not been harmonious, and in many of them what is said on this subject is mere dictum."

And he concludes:

> "In view of this conflicting and uncertain condition of the authorities, it cannot be successfully claimed that the doctrine of absolute ownership is well established in this state."

He points out further that in all the opinions "there has been no notice at all taken of the conditions existing here, so radically opposite to those prevailing where the doctrine arose." That Court, therefore, refused to accept the contention that prior decisions had established any fixed or definite rule on the subject or that the same constituted a rule of property.

As already suggested the early decisions in Utah will be found to be of the same indefinite and inharmonious character. These cases are fully reviewed and analyzed in the brief for the respondents, and it is not thought necessary to duplicate what has there been so admirably said. The question, however, constitutes the final reliance of the petitioner, and we feel warranted in discussing it briefly.

In chronological order, the first decision of the Utah Supreme Court is that of *Sullivan* v. *Mining Company*, 11 Utah, 438. In the course of the opinion it is true the Court said that the owner of lands had a right to dig thereon and appropriate and use percolating waters therein, although by so doing he might dry up the wells or spring of an adjacent appropriator, but this was pure dictum. The only question which it was necessary to consider in that case, as the Court itself said, was:

> "Can the discoverer of a flow of percolating waters on the public lands, by digging wells and

> improving the same and constantly using the water for a beneficial purpose, acquire a right to take water * * *"

as against one who subsequently acquires title to the land? The Court answered its own question in the affirmative, and this was all that was necessary to a disposition of the case. That the statement with reference to the right to interfere with the well or spring of an adjacent appropriator was purely dictum is quite apparent. The Court, after making the observation respecting the rule, itself said:

> "But this rule does not determine the case at bar."

What the case holds is merely that an appropriator of percolating waters acquires a right as against one whose title to the lands is *subsequent*. The further and final suggestion of the Court that as against such an appropriator the owner may sink an adjoining well on his own premises, although he should thereby dry up that of the first appropriator, is, of course, wholly gratuitous, having only the force of *obiter dictum*. However, it is far from affirming the right of the owner to appropriate the percolating water for *commercial purposes* to the injury of his neighbor.

The case of *Cresent Mining Company* v. *Silver King Mining Company*, 17 Utah 444, we submit has no application to the instant case. The waters there encountered by the construction of a tunnel were not subject to the prior claim of any person, but after leaving the premises of the Silver King Company they were applied to the use of the Cresent Mining Company. Thereafter the Silver King Company began to use the water which

it had theretofore developed, and the Cresent Company brought suit. It is manifest that the waters thus developed were not subject to appropriation until after they had left the land of the Silver King Company, a condition which that Company had a legal right to end at its pleasure, and the Supreme Court of Utah so held. The Court again went out of its way, as it did in the Sullivan case, to refer to the rule of the common law as announced in the latter case, and the suggestions we have made with reference to that case are applicable to the Cresent-Silver King case as well.

*Herriman Irrigation Company* v. *Butterfield Mining Company*, 19 Utah 458, and *Herriman Irrigation Company* v. *Keel*, 25 Utah 96, represent two appeals of the same case. Upon the first appeal the trial court was reversed upon the facts. The question which is here involved was really not considered. Upon the second appeal it appeared that the trial court had found that the construction of the tunnels had not resulted in drying up or diminishing the flow of the sources of supply of Butterfield Creek. This finding was upheld by the Supreme Court. Opinions were rendered seriatim by the three Judges of the Court. Mr. Justice Bartch discussed at some length the rule in respect of percolating waters, and reached the conclusion that plaintiff was not entitled to any relief. Chief Justice Miner concluded, however, that the evidence tended to show that the water encountered by the defendant's operations was flowing in definite channels and that half of the quantity flowing from the defendants tunnel should be awarded to the respondents. Mr. Justice Baskin partially concurred in this opinion of the Chief Justice, but took sharp issue with the views of Justice Bartch and

delivered an opinion in favor of the "American doctrine." It will be seen that the three Judges were in hopeless disagreement, and no authoritative decision resulted upon the question which is involved in the instant case.

The Supreme Court of Utah, in the recent case of *Horne* v. *Utah Oil Refining Company,* ..... Utah ...., 202 Pac. Rep. 815, commenting upon this case said that it was

> "unsatisfactory as an authoritative decision for several reasons: (1) it was rendered by a divided court, each of the three Justices delivering a separate opinion disagreeing in the essential particulars; (2) in the main it was decided upon a question of fact partially sustaining a finding of the trial court to the effect that the driving of defendant's tunnel did not interfere with the water to which plaintiff was entitled; (3) it does not appear that the real basis of plaintiff's right to the water by prior appropriation, namely, the laws of Congress, or of the State, authorizing appropriation, or authorities in support thereof, were presented to or considered by the Court. On the other hand, it does appear that the common law doctrine relied on by defendants was ably presented by defendant's counsel and also considered by the court.
>
> "In any event, the doctrine enunciated in that case, insofar as it appears to support the common law rule relating to percolating waters relied on by appellant in the instant case, has been seriously discredited, if not overruled by this Court in more recent decisions."

There follows a citation of the more recent Utah cases.

*Willow Creek Irrigation Co.* v. *Michaelson,* 21 Utah 48, 81 Am. St. Rep. 687, was a case which simply followed the principle laid down in the *Cresent-Silver King* case. The defendant owned a tract of land, upon which by gradually increasing percolation, water had appeared in the form of a marsh, finally overflowing into Willow Creek, a stream which had been appropriated by the plaintiffs. The Court merely held that water so arising was not subject to appropriation under any statute or rule of law, and hence the defendant had the lawful right to divert and use it.

*Garns* v. *Rollins,* 41 Utah 260, and *Roberts* v. *Gribble,* 43 Utah 411, were both cases involving the right to appropriate percolating waters produced by the artificial operations of the owner of the land upon which they appeared. In both cases it was held that such waters were not subject to the right of appropriation, a doctrine which seems to have been modified, at least to some extent, by the decision in *Rasmussen* v. *Moroni Irrigation Co.,* 189 Pac. 572. The cases were decided, as shown by the syllabus in the Garns case

> "without reference to the question as to whether the common law rule that water percolating through the soil without any definite channel is a part of the freehold should be modified. * * *."

In the course of the opinion in this case the Court again departed from the question involved in the case to discuss the common law doctrine which it said had been adhered to in preceding cases "insofar as applicable to the questions litigated." These cases we have discussed in the preceding pages, and their inapplica-

bility to the case at bar we think clearly demonstrated. In the course of the opinion (page 266) the Court, however said:

> "The general trend, however, of recent decisions in many of the states of the Union, is away from the English rule, or common law doctrine of unqualified and absolute right of a land owner to intercept and draw from his land the percolating waters therein. In these later cases the right of a land owner to subterranean waters percolating through his own and his neighbor's land, and which is a common source of supply of the land of two or more of them, is limited to a reasonable and beneficial use of the water upon the land, or to some useful purpose connected with its occupation and enjoyment."

This was the state of the decisions in Utah at the time the opinion was rendered in the case of *Stookey* v. *Green*, 53 Utah 311. In this opinion, as stated by the Circuit Court of Appeals in the instant case, the prior decisions were in effect repudiated and the American rule adopted, although not in express terms. In the subsequent case of *Rasmussen* v. *Moroni Irrigation Company*, supra, the Utah Court seems to have finally and positively committed itself to the American rule. In that case the plaintiff was the owner of a tract of land, together with a water right for the same. In the course of irrigating this land and because of the irrigation of other lands at a higher elevation, the defendant's tract became swampy to such a degree that water flowed therefrom into the Sanpitch River. The plaintiff undertook to recover this water by diverting an equivalent quantity from the River to be used on other lands. Prior appropriators from the River contested this right,

and plaintiff brought suit against them to quiet his title to the use of the water in question. Judgment was rendered in favor of the defendants, which judgment the Supreme Court affirmed. Here, then, is a case which seems to be squarely in point, in which the Supreme Court of Utah sustains the right of the prior appropriators as against the claim of the owner of the land to the percolating water therein. The Court definitely adopts the American rule by saying:

> "The prniciple we invoke and seek to enforce in this case is so well stated by the author in 2 Kinney, Irr. and Water Rights, at Sections 1193 and 1194, that we take the liberty of quoting somewhat at length from the latter section."

In the course of the quotation, which it is not necessary to repeat here in full, the following occurs:

> "And, where rights of the stream itself have been once acquired, by appropriation or otherwise, it is unlawful for persons owning land bordering on the stream to intercept the waters percolating through them on their way to the stream, and apply it to any use other than its reasonable use upon the land upon which it is taken, if he thereby diminishes the flow of the stream to the damage of those having rights therein. Therefore this rule modifies the common law rule that the owner of the land is also the owner of all the water found percolating as a part of the soil itself, and that he may use and dispose of it as he sees fit, to the extent that he may only use these waters so percolating through his land, subject: First, to the rights of others to the water flowing in the stream which this water augments, upon the same principle as though this water was a part of the stream itself. * * *."

That the Supreme Court of Utah by this decision adopted and intended to adopt the American rule and repudiate the so-called English rule is made manifest by the concluding part of the opinion, which is quoted and emphasized in the opinion of the Circuit Court of Appeals in the instant case:

> "The fact that the water in question may be percolating or seepage, as contra-distinguished from the water flowing in known and defined underground channels, does not alter the case. The controlling question always is: Was the water in question appropriated and put to beneficial use by others before the interception and attempted appropriation thereof by the land owner?"

At most, the earlier cases left the question in doubt. They were inharmonious and unsatisfactory. Certainly they fall short of *establishing* the English rule for the State of Utah, but the *Rasmussen* case is a definite and decisive acceptance of the American rule. As stated by the Circuit Court of Appeals in the instant case:

> "If there be any inconsistency in the opinions of the court of last resort of a State in determining a rule of law, which the national courts are bound to follow, the general rule is that they will follow the latest settled adjudication in preference to the earlier ones." 271 Fed. 163.

Since the decision of the instant case by the Circuit Court of Appeals, the Supreme Court has had occasion to review this question at great length. *Horne* v. *Utah Oil Refining Company*, .... Utah ...., 202 Pac. Rep. 815. The spokesman for the Court in this case was Mr. Justice Thurman, whose great learning, especially in this class of cases, if it were not already known, would

be clearly demonstrated by this able opinion. He reviews at length the authorities, and especially the earlier cases in Utah, and says:

> "We are inclined to adopt the view expressed by defendant in the excerpt quoted, that the waters, while in the ground, are what are known as 'percolating' waters. A reasonable interpretation of the complaint itself would seem to justify such conclusion. With this conclusion as a basis for its contention, defendant makes the point that the waters thus percolating through and underneath its land cannot be distinguished from the soil itself and therefore belong to the owner of the land. The proposition is advanced that 'whoever owns the soil owns also the waters therein percolating through it'. In support of the proposition defendant cites the following authorities:"

Then follows a list of the cases cited. Commenting upon these cases, he says:

> "It must be conceded that *as applied to the special facts* in each of the cases cited the proposition advanced by defendant finds ample support. In fact, '*cujis est solum ejus est usque ad infernos*' or 'he who owns the soil owns it to the lowest depth below,' is a maxim of the common law almost coeval with its very beginning."
>
> (our italics)

Among the cases enumerated were the *Cresent-Silver King* case, *Willow Creek Irrigation Company* v. *Michaelson,* and *Herriman Irrigation Company* v. *Keel.* Speaking of these three cases, Justice Thurman says:

> "Neither of them have any bearing upon the question presented here."

He proceeds to analyze the three cases. In the *Crescent-Silver King* case he says that it was held that the owner of the land is the owner of the percolating water therein and can apply it to his own use whenever he wishes, a doctrine which is not controverted. But he immediately adds:

> "Let it be borne in mind, however, that in that case no one claimed a prior right to the water by virtue of a prior appropriation under the Federal laws or laws of the State, nor was it a case in which the Cresent Company could claim a right by virtue of any sort of interest in common with the defendant Silver King Company",

thus distinguishing it, as he points out, both from *Sullivan* v. *Mining Company*, supra, and *Stowell* v. *Johnson*, 7 Utah 215.

*Willow Creek Irrigation Company* v. *Michaelson*, supra, is disposed of by calling attention to the fact that it is similar in principle to the Cresent-Silver King case. Coming to the Herriman case, he says that it appears to go farther than any other in support of the English rule, but immediately points out its unreliability in the following language:

> "The case is unsatisfactory as an authoritative decision for several reasons: (1) It was rendered by a divided court, each of the three justices delivering a separate opinion disagreeing in essential particulars; (2) in the main it was decided upon a question of fact partially sustaining a finding of the trial court to the effect that the driving of a the trial court to the effect that the driving of defendant's tunnel did not interfere with the water to which plaintiff was entitled; (3) it does not appear that the real basis of plaintiff's right to the water by

prior appropriation, namely, the laws of Congress, or of the state, authorizing appropriation, or authorities in support thereof, were presented to, or considered by, the court. On the other hand it does appear that the common law doctrine relied on by defendants was ably presented by defendants' counsel and also considered by the court."

There follows an elaborate discussion of the American cases which support the American rule, from which the Court finally concludes:

"The best considered modern authorities seem to be overwhelmingly in favor of the doctrine of correlative rights in cases of this kind. For this reason, as well as upon a careful consideration of the equities of the case, the court is of the opinion that plaintiffs' complaint states a cause of action for equitable relief and that defendant's general demurrer thereto was properly overruled."

We submit in conclusion that whether this Court bases its decision upon the rule now finally established by the Supreme Court of Utah, or, rejecting these later cases, reaches a determination in the light of the climatic and local conditions of Utah and in accordance with the weight and the prevailing trend of the American authorities, the decision of the Circuit Court of Appeals should be affirmed.

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Service of the foregoing brief together with petition for leave to file brief and make argument as amicus curiae acknowledged and copies received this 5th day of October, 1922.

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# SUPREME COURT OF THE UNITED STATES.

October Term, 1921

No. [redacted]68

SNAKE CREEK MINING AND TUNNEL COMPANY, PETITIONER,

*vs.*

MIDWAY IRRIGATION COMPANY AND WILFORD VAN WAGENEN, RESPONDENTS.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

## SUPPLEMENTAL BRIEF ON BEHALF OF THE PETITIONER.

Petitioner's Supplemental Brief, devoted exclusively to a discussion of the case of Horne v. Utah Oil Refining Company, decided by the Supreme Court of Utah after issuance of Writ of Certiorari in this case.

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# SUPREME COURT OF THE UNITED STATES.

**October Term, 1921**

**No. 302**

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SNAKE CREEK MINING AND TUNNEL COMPANY, PETITIONER,

*vs.*

MIDWAY IRRIGATION COMPANY AND WILFORD VAN WAGENEN, RESPONDENTS.

**ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.**

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## SUPPLEMENTAL BRIEF ON BEHALF OF THE PETITIONER.

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(Note. Figures in parentheses refer to pages of the printed record in this court unless otherwise indicated.)

On October 8, 1921, more than four months after the writ of certiorari was granted by this court in this case, the Supreme Court of Utah handed down its decision in the case of *Horne* v. *Utah Oil Refining Company*, 202 Pac. Rep. 815 (not yet reported in the official reports of Utah). Doubtless this last decision of the Supreme Court of Utah will be cited by counsel for the respondents in support of their contention that the common law rule relative to percolating waters in the State of Utah has been overruled by the Supreme Court of that state. The case, therefore, needs special consideration.

The opinion in this last pronouncement of the Supreme Court of Utah was written by Mr. Justice Thurman, who, before being elevated to the Supreme Court, was one of the advocates for the respondents in the instant case and actively participated in the first trial of the case at bar in the United States District Court for the District of Utah.

This supplemental brief will be confined to a discussion of the decision in *Horne* v. *Utah Oil Refining Company* and the subject will be taken up under the following divisions:

I. The facts in the case of *Horne* v. *Utah Oil Refining Company* are entirely different from the case at bar and the case is differentiated by the Supreme Court of Utah from its former decisions laying down the common law doctrine relative to percolating waters in cases like the case at bar.

II. Even though it be conceded *arguendo* that this late decision of the Supreme Court of Utah in any way modifies the common law doctrine as it theretofore existed for more than twenty-six years in the State of Utah, the case of *Horne* v. *Utah Oil Refining Company* is not binding on and will not be followed by this court in deciding the instant case, because it was decided after the writ of certiorari was granted in the present case and after the rights to the water in controversy had been acquired by plaintiff under the common law doctrine, which at the time such rights were acquired and at the time this suit was instituted, was a well-established rule of property in the State of Utah under the decisions of the Supreme Court of that State as well as by the statutory law of Utah.

## I.

In *Horne* v. *Utah Oil Refining Company*, it appeared that underlying a certain area of land located near Salt Lake City, is a well defined artesian basin located in a well defined underground pervious stratum and is under pressure, so that when the impervious cap layer is pierced, the water is forced to flow above the surface in artesian wells and that this artesian basin had furnished water through artesian wells for the plaintiffs for a period of from fifteen to forty-five years; that the defendant procured an option on a small portion of land (ten rods by ten rods) at a point lower than the land of plaintiff, but adjoining plaintiff's lands, and put down six 6-inch artesian wells (the plaintiff's wells being only 2 inches in diameter), resulting in a material diminution of the supply of water flowing through plaintiff's wells, and that defendant threatened to place strong pumps on its wells to increase the supply of water flowing from the same, which would result in withdrawing the water from the entire basin into defendant's wells. Defendant's acquisition of the land and drilling of the wells were for the purpose of obtaining a larger supply of water to be carried to its industrial plant some distance from the land in which the wells were drilled.

It will be noted from the foregoing statement of facts that the case is not at all like the case at bar, but is more nearly like cases involving common rights of owners of land overlying underground oil and gas reservoirs.

*Ohio Oil Co.* v. *Indiana*, 177 U. S. 190.

In the case last cited this court held (page 203) that the oil and gas "belong to the owner of the land and are a part of it so long as they are on it, or in it, or subject to his control, but when they escape and go into other land or come under another's control, the title of the former owner is gone;" that there exists a common ownership in the reservoir by the owners of the superincumbent surface, and held that until the oil or gas is actually reduced to possession, by the persons owning the surface, the rights of each of these co-owners in such common ownership may be protected either through statutory enactments or suits in equity.

Cases involving underground reservoirs of oil and gas, such as the case of *Ohio Oil Company* v. *Indiana, supra,* and artesian basins of water such as *Horne* v. *Utah Oil Refining Company, supra,* where the body of oil, gas or water existing in the underground basin and extending under a large area of land, is well known, present a controversy entirely different from that presented under the facts in the case now under consideration. In this case the claim of the respondent that the tunnel of the petitioner intercepted the sources of supply of the springs which fed the stream from which the respondents claimed the right to divert water, was based on pure speculation. No evidence was offered from which it could be determined, except as *a mere guess,* that the water percolating into the tunnel of the petitioner was in any manner connected with the underground sources of supply of the springs which fed the streams from which respondents derived their water. It was only because the Cir-

cuit Court of Appeals held that the burden rested upon the petitioner that it found the facts in favor of the respondents.

Judge Johnson in deciding this case, and referring to the claims of the respondents in this regard, stated:

> "There is no evidence in the case that any of the springs situated at the foot of the mountains near Midway have ceased to flow, or, in fact, that there has been any diminution in the flow of any of these springs." (21.)

Again the court in its opinion said, referring to the fissures or openings cut by the tunnel and through which some of the water came into the tunnel:

> "Indeed, it would be *the merest guess* to say that these fissures or openings are continuous any substantial distance away from the point cut by the tunnel." (21.)

Referring to the testimony of the water users, who were stockholders in the Midway Irrigation Company, the court said:

> "The best that can be said for the testimony of the water users is that they gave their best judgment, in short, their opinions." (20.)

It is difficult to follow the reasoning of Mr. Justice Thurman in *Horne* v. *Utah Oil Refining Co.*, for in one breath he states that "the decisions of the Supreme Court of Utah" which we have cited and quoted from in our original brief and which announced the common law doctrine contended for by us, "have never been overturned," whereas, in the next breath, he states that the common law rule relating to percolating waters "has been ser-

iously discredited, if not overruled, by this court in more recent decisions."

Mr. Justice Thurman, in the decision of *Horne* v. *Utah Oil Refining Co.*, fully recognized the difference between that case and the former decisions of the Supreme Court of Utah announcing the common law doctrine relative to percolating water. Referring to the case of *Herriman Irrigation Co.* v. *Keel*, (cited in our original brief) and which was a case involving the rights to percolating waters encountered by a mining company in the driving of a tunnel, exactly as is the case at bar, stated at page 819:

> "Even if the doctrine enunciated in the Herriman case had not been modified or overruled by later decisions, *the relative conditions of the parties and properties involved in that case were such as to render the decision wholly inapplicable to the conditions existing in the case at bar.* We need not occupy time and space in making the distinction; it will readily occur to the reader upon the most casual examination of the facts and conditions referred to. It is sufficient to say that the instant case is *sui generis* in this jurisdiction."

In *Horne* v. *Utah Oil Refining Co.*, the defendant contended that "who ever owns the soil, owns also the waters therein percolating through it" and cited numerous cases, including all of the cases of the Supreme Court of the State of Utah announcing and reaffirming the common law doctrine relative to percolating waters, which we cited and quoted from in our original brief. A list of the cases so cited by counsel for the defendant will be found

on page 818 of 202 Pacific Reporter. After citing these cases the court at page 819 states:

> "It must be conceded that as applied to the special facts in each of the cases cited, the proposition advanced by defendant finds ample support. In fact '*Cujus est solum ejus est usque ad infernos,' or* 'He who owns the soil owns it to the lowest depth below,' is a maxim of the common law almost coeval with its very beginning.
>
> These decisions of this court are cited in the above mentioned cases. Neither of them has any bearing upon the question presented here. *In the case of Crescent Min. Co.* v. *Silver King Min. Co., supra, it was held that the owner of the land in which water is found in a percolating state is the owner of the water, and can apply it to his own use whenever he wishes—a doctrine which, under the facts of that case, is incontrovertible, and no attempt has ever been made to controvert it in any subsequent case.*"

The foregoing announcement of the Supreme Court of Utah respecting the doctrine laid down in *Crescent Mining Company* v. *Silver King Mining Company* (a case exactly like the case at bar), is but a reaffirmance by the Supreme Court of Utah of the common law doctrine of percolating waters and conclusively demonstrates the soundness of our argument at pages 12 to 21 of our original brief to the effect that the Circuit Court of Appeals misconstrued and misapplied the decisions of the Supreme Court of Utah when it held that the common law rule had been overruled by the Supreme Court of Utah in its later decisions.

Since, therefore, the case as announced by the Supreme Court of Utah is entirely dissimilar from cases like the one at bar, and "*is sui generis* in this jurisdic-

tion," it must follow that notwithstanding the long argument of the court respecting the so-called "American rule" and the many cases cited in support of that rule, the decision can have no bearing on the rights of the parties in the case now before this court, unless it be to reaffirm, as it does, the common law rule here contended for.

The last above quoted excerpt from *Horne* v. *Utah Oil Refining Co.* is followed by a comment of the court to the effect that "if the Crescent Company had owned a right to the water by prior appropriation under some law authorizing appropriation * * * a different case would have been presented, resulting, perhaps, in a different determination." (202 Pac. Rep. 819.)

As the respondents here have claimed the water by "prior appropriation," the foregoing comment of the Supreme Court of Utah, even though unnecessary to a decision of the case, should perhaps be given some consideration in this brief.

If it be claimed that the appropriation of water by respondents extended beyond a mere appropriation of such waters as in the course of events should ultimately reach the surface, or, in other words, that the appropriation reached into the bowels of the earth so as to embrace within the clutch of the appropriator the subterranean percolating waters which no human eye and no science yet known to man, can trace, our answer is twofold:

*First:* The common law under the decision of this court in *Mormon Church* v. *United States*, 136 U. S.

1, became operative in Utah in 1850 and remained so *"except as it might be altered by legislation"* (to use this court's expression in that case). No statute authorizing appropriation was adopted in Utah until 1888 and then it extended only to surface waters. (See our discussion of this question in our Reply Brief, pp. 7-10.)

*Second:* The people of Utah through their legislatures have steadfastly refrained from authorizing appropriations beyond *surface* waters, unless the underground waters sought by an appropriator shall be confined *"in known or defined channels."* (See our discussion of this subject in our Reply Brief, pp. 12-15.)

## II.

There is another reason why the case of *Horne* v. *Utah Oil Refining Co.*, even conceding for the sake of the argument that it conflicts with the prior decisions of that court relied upon by petitioner, will not be followed by this court in arriving at its conclusions in this case.

The case at bar was commenced in the United States District Court for the District of Utah on July 6, 1914; the construction of the tunnel was commenced in April, 1910, and by March 11, 1915, petitioner had expended $346,000 in the construction of the tunnel and a much larger sum had been expended by petitioner at the time the case came on for trial, May 27, 1918, the tunnel then having been driven into the mountain 14,500 feet. At all of the times stated in this paragraph, the common law rule relative to the ownership and rights of percolating water, was the law of the State of Utah and the petitioner, a citizen of Delaware, had a right to rely upon that rule as the rule of property when it acquired its land, when it commenced the construction of its tunnel, and during all of the time it was continuing the construction of its tunnel. The record shows that the percolating water encountered in the driving of the tunnel made the construction thereof very costly to the petitioner. (240, 266-7, 285.) Before this tunnel was ever started other mining companies in Utah had constructed tunnels for the purpose of draining their mines, for transportation and for the working of the mines, and had encountered percolating waters in large quantities. The rights of these min-

ing companies to such percolating waters had been disputed in the courts of Utah, exactly as are the rights of the petitioner in this case, and in each and every instance the Supreme Court of the State of Utah and the United States District Court for the State of Utah, upheld the title of the mining company under the common law rule.

It is therefore fair to assume that this petitioner when it acquired the property through which this tunnel was constructed, when it contracted for the construction of the tunnel, and as it continued to expend money for the construction of the tunnel, did so relying upon the rule of property which had been established by the courts of Utah and with the full expectation that notwithstanding percolating waters would be encountered, thereby greatly increasing the cost of construction of the tunnel, these waters would become the property of the petitioner from which it might remunerate itself, at least in part, for the extra cost of construction resulting from the waters encountered.

To now hold that the case of *Horne* v. *Utah Oil Refining Co.*, overturns this rule of property and takes away the title of petitioner to the waters would seem most unjust.

Circuit Judge Sanborn, speaking for the Circuit Court of Appeals for the Eighth Circuit, refusing to follow a decision of the Supreme Court of Missouri overruling decisions of the same court which remained un-

challenged from 1880 to 1904, made use of the following expression:

> *"An ex post facto change of the law by construction is as vicious as by legislation."*
>
> *Westinghouse Air Brake Co.* v. *Kansas City etc. Co.*, 137 Fed. 26, 35.

This court in *Mormon Church* v. *U. S.*, 136 U. S. 1, heretofore cited, held:

> "That it was the intention of Congress that the system of common law and equity which generally prevails in this country, shall be operative in the territory of Utah *except as it might be altered by legislation.*"

We have already referred to the statutory law of Utah clearly demonstrating that the common law was adopted by the people of Utah through its legislature and that in none of the acts of the legislature relating to waters or water rights, has the common law ever been modified. (See our Reply Brief.)

*For a period of at least twenty-six years,* towit, from the time of the first decision of the Supreme Court of Utah—*Sullivan* v. *Mining Co.*, 11 Utah, 438—decided in June, 1895, down to the decision of *Horne* v. *Utah Oil Refining Co.*, the common law rule relating to percolating waters has been followed in the State of Utah. Under circumstances such as are presented in this case, this court has repeatedly refused to follow decisions of the state court, which, if followed, would result in the destruction of rights acquired under a different state of decisions.

If, as we contend, there was in Utah at the time this suit was instituted, a well settled rule of property fixed either by statutory law or the decisions of the highest court of that State, respecting title to and rights concerning subterranean percolating waters, the Federal courts, under repeated decisions of this court, will be governed by that rule of property.

*Hinde* v. *Vattier's Lessee,* 5 Pet. 398, 401;
*Hardin* v. *Jordan,* 140 U. S. 371, 387;
*Burgess* v. *Seligman,* 107 U. S. 20, 33;
*Kuhn* v. *Fairmont Coal Co.,* 215 U. S. 349, 357;
*Sim* v. *Edenborn,* 242 U. S. 131, 135;
*Claiborn* v. *Brooks,* 111 U. S. 400, 411;
*Detroit* v. *Osborne,* 135 U. S. 492, 498;
*Bucher* v. *Cheshire R. Co.,* 125 U. S. 555, 584.

In *Hinde* v. *Vattier's Lessee, supra,* this court states at page 401:

> "There is no principle better established and more uniformly adhered to in this court than that the Circuit courts in deciding on titles to real property in the different states, are bound to decide precisely as the state courts ought to do. *Wilkinson* v. *Leland,* 2 Pet. 656. The rules of property and of evidence, whether derived from the laws or adjudications of the judicial tribunals of a state, furnish the guides and rules of decision in those of the Union, in all cases to which they apply, where the constitution, treaties, or statutes of the United States do not otherwise provide."

And in *Bucher* v. *Cheshire R. Co., supra,* this court states the rule in the following language at page 584:

> "It may be said generally that wherever the decisions of the state courts relate to some law of a local character, which may have become established by those courts, or has always been a part of the law of the state, that the decisions upon the subject are usually conclusive, and always entitled to the highest respect of the Federal courts. The whole of this subject has recently been very ably reviewed in the case of *Burgess* v. *Seligman,* 107 U. S. 20. Where such local law or custom has been established by repeated decisions of the highest courts of a state it becomes also the law governing the courts of the United States sitting in that state."

But the United States Courts have repeatedly held that they are not bound by, and will not follow, decisions of the state court, decided *after* the rights of the parties have accrued, when such decisions are "opposed to the entire course of previous decisions in that state."

*Hardin* v. *Jordan,* 140 U. S. 371, 387, 397;

*Kuhn* v. *Fairmont Coal Co.,* 215 U. S. 349, 359;

*Loeb* v. *Columbia Township,* 179 U. S. 492, 493;

*Julian* v. *Central Trust Co.,* 193 U. S. 93, 102;

*Great Southern Hotel Co.* v. *Jones,* 193 U. S. 532, 542;

*Township* v. *Marcy,* 92 U. S. 289, 294;

*Northrup* v. *Columbian Lumber Co.,* 186 Fed. 770, 781;

*Westinghouse etc. Co.* v. *Kansas City Co.,* 137 Fed. 26, 35;

*Louisville Trust Co.* v. *City,* 76 Fed. 296, 300.

And other cases hereinafter cited.

*Hardin* v. *Jordan*, 140 U. S. 371, was a case where this court had under consideration the common law rule affecting the rights of land owners as riparian proprietors owning land bordering a non-navigable lake, and this court held that the common law rule having been in force in Illinois when the patent to the land was granted, it was controlling notwithstanding a subsequent opinion of the Supreme Court of Illinois over-turning its former decision, and in doing so the court at page 397, in an opinion written by Mr. Justice Bradley, employed the following language:

> "We do not think that this argument *ab inconvenienti* is sufficient to justify an abandonment of the rules of the common law, which, as we have shown, have been adopted in Illinois as the law of the land. It is too much like judicial legislation. It is as much as to say: 'We think the common law might be improved, and we will, therefore, improve it.'"

The rules for the guidance of the Federal courts are thus succinctly stated by Mr. Justice Harlan, speaking for this court, in *Kuhn* v. *Fairmont Coal Co.*, *supra*, at page 360: (Italics are by the court.)

> "We take it then, that it is no longer to be questioned that the Federal courts in determining cases before them are to be guided by the following rules: 1. When administering state laws and determining rights accruing under those laws the jurisdiction of the Federal court is an independent one, not subordinate to but co-ordinate and concurrent with the jurisdiction of the state courts. 2. Where, *before the rights of the parties accrued*, certain rules relating to real estate have been so established by state decisions as to become rules of property and action in the state, those rules are accepted by the Federal

> court as authoritative declarations of the law of the State. 3. *But where the law of the State has not been thus settled,* it is not only the right but the duty of the Federal court to exercise its own judgment, as it also always does when the case before it depends upon the doctrines of commercial law and general jurisprudence. 4. So, when contracts and transactions are entered into and rights have accrued under a particular state of local decisions, *or when there has been no decision by the state court on the particular question involved,* then the Federal courts properly claim the right to give effect to their own judgment as to what is the law of the state applicable to the case, even where a different view has been expressed by the state court after the rights of parties accrued. But even in such cases, for the sake of comity and to avoid confusion, the Federal court should always lean to an agreement with the state court if the question is balanced with doubt."

In the case last cited Mr. Justice Harlan cites and quotes from numerous decisions of this court in which it has been held that where "rights have accrued under a particular state of the local decisions * * * then the Federal courts properly claim the right to give effect to their own judgment as to what is the law of the state applicable to the case, *even where a different view has been expressed by the state court after the rights of parties accrued.*"

In *Gelpcke* v. *Dubuque,* 1 Wall. 175, this court refusing to follow a decision of the Supreme Court of Iowa overruling earlier adjudications, stated at page 206:

> "The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this

court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. The rule embraces this case.

* * *

"We are not unmindful of the importance of uniformity in the decisions of this court, and those of the highest local courts, giving constructions to the laws and constitutions of their own States. It is the settled rule of this court in such cases, to follow the decisions of the State courts. But there have been heretofore, in the judicial history of this court, as doubtless there will be hereafter, many exceptional cases. *We shall never immolate truth, justice and the law, because a State tribunal has erected the altar and decreed the sacrifice.*"

And again in *Rowan* v. *Runnels*, 5 How. 134, this court again refusing to follow a state decision over-turning former adjudications, states at page 139:

"But we ought not to give to them a retroactive effect and allow them to render invalid contracts entered into with citizens of other states, which in the judgment of this court were lawfully made. For, if such a rule were adopted, and the comity due to state decisions pushed to this extent, it is evident that the provision in the constitution of the United States, which secures to the citizens of another state the right to sue in the courts of the United States, might become utterly useless and nugatory."

So in *Douglas* v. *County of Pike*, 101 U. S. 677, again refusing to be bound by a state decision overruling former state decisions, where rights had accrued, this court states the rule at page 687 as follows:

"The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights

that would be given to a legislative amendment; that is to say, *make it prospective, but not retroactive.* After a statute has been settled by judicial consruction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statutes as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment.

* * *

We recognize fully, not only the right of a state court, but its duty to change its decisions whenever, in its judgment, the necessity arises. It may do this for new reasons, or because of a change of opinion in respect to old ones; and ordinarily we will follow them, except so far as they affect rights vested before the change was made. The rules which properly govern courts in respect to their past adjudications, are well expressed in *Boyd* v. *Alabama* (94 U. S. 645) where we spoke through Mr. Justice Field."

In *Pease* v. *Peck*, 18 How. 595, at page 599, the court refusing to be bound by a state decision where rights had accrued under previous decisions, stated:

"When the decisions of the state court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions—and much more is this the case where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines, subversive of former safe precedent. Cases may exist also, when a cause is got up in a state court for the very purpose of anticipating our decision of a question known to be pending in this court. Nor do we feel bound in any case in which a point is first raised in the courts of the United States, and has been decided in a circuit court, to reverse that decision contrary to our own convictions, in order to conform to a state decision made in the

meantime. Such decisions have not the character of established precedent declarative of the settled law of a state.

*Parties who, by the constitution and laws of the United States, have a right to have their controversies decided in their tribunals, have a right to demand the unbiased judgment of the court.* The theory upon which jurisdiction is conferred on the courts of the United States, in controversies between citizens of different states, has its foundation in the supposition that, possibly, the state tribunal might not be impartial between their own citizens and foreigners."

In *Burgess* v. *Seligman*, 107 U. S. 20, it was contended that this court was bound by two decisions of the Supreme Court of Missouri rendered by that court after the determination of the case of *Burgess* v. *Seligman* by the Circuit Court of the United States, the opinions of the Supreme Court of Missouri being adverse to the judgment rendered by the Circuit Court of the United States, but this court refused to be bound by or follow the decisions of the Supreme Court of Missouri. Many of the decisions of this court are cited and quoted from and at page 33 the court states:

"We do not consider ourselves bound to follow the decision of the State court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the statute had been given by the State tribunals contrary to that given by the Circuit Court. The Federal courts have an independent jurisdiction in the administration of State laws, co-ordinate with, and not subordinate to, that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions

in the same territory is peculiar, and the results would be anomalous and inconvenient, but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of decisions, or when there has been no decision, of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued."

It is, therefore, respectfully submitted that *first*, the decision of *Horne* v. *Utah Oil Refining Company*, reaffirms the common law rule of percolating waters as the same has existed in Utah for more than twenty-six years in cases like the one at bar; and *second*, if it shall be concluded that this latest case of the Supreme Court of Utah, is in conflict with its earlier decisions, effective when petitioner's rights accrued, the earlier decisions and not *Horne* v. *Utah Oil Refining Co.* will furnish the rule

and guide for this court in deciding the present controversy.

HERBERT R. MACMILLAN,
Solicitor for Petitioner.

JOHN A. MARSHALL,
BEN S. CROW,
Of Counsel.

Service by copy of foregoing Supplemental Brief of Petitioner accepted this.....day of March, 1922.

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Solicitors for Respondent.

# In the Supreme Court of the United States

OCTOBER TERM, 1920

SNAKE CREEK MINING AND TUNNEL COMPANY, a Corporation,

Petitioner,

vs.

MIDWAY IRRIGATION COMPANY, a Corporation, and WILFORD VAN WAGENEN,

Respondents.

No. [redacted]98

Reply Brief of Petitioner on Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

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B. S. CROW,
Of Counsel.

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MIDWAY IRRIGATION COMPANY, a Corporation, and WILFORD VAN WAGENEN,
Respondents.

No. 880.

**Reply Brief of Petitioner on Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.**

A perusal of respondents' brief will but convince this court of the soundness of petitioner's contention and the necessity for the granting of the writ prayed for.

Respondents' counsel have signally failed to meet our claims.

If the decision of the Circuit Court of Appeals does not conflict with the decisions of the Utah Supreme Court, why have respondents' counsel made *absolutely no*

*attempt to explain the distinction drawn with such extreme care in the* **Rasmussen** *decision by the Utah Supreme Court between its decisions involving* **natural** *subterranean percolating waters and its decisions involving seepage waters* **artificially** *produced?*

Counsel have referred to this **vitally important distinction** made by the Utah Supreme Court in a nonchalant manner, but without attempt to explain it, which is clearly indicative of the impossibility of meeting our contention. (See Respondents' Brief, page 41.)

If the **Rasmussen** case (upon which the Circuit Court of Appeal's decision is founded) does not in its facts and the principles of law governing those facts, differ "as clearly as the night does from the day," from the Utah cases which lay down the rule of percolating waters, why have counsel made no attempt to explain what the Utah Supreme Court meant by pointing to this distinction in *three* different parts of its opinion in the **Rasmussen** case?

If there are not *two distinctly different lines of decisions in Utah,* one relating to **natural** percolating waters and the other to seepage waters **artificially** produced, and each line of decisions governed by entirely different principles of law, why have counsel made absolutely no attempt to answer our contention in this regard?

**Kinney on Irrigation—Cited by Court of Appeals and respondents:** At pages 39 and 41 of respondents' brief, reference is made to the quotation from Kinney on Irrigation and Water Rights appearing in the Rasmussen decision, and this same quotation was referred to by the Circuit Court of Appeals. Considered alone, the quotation of this lan-

guage of Kinney would seem to support the decision of the Court of Appeals, but when the **Rasmussen** decision of the Utah Supreme Court is considered as a whole, it will be seen that the language used by Kinney was not intended to be adopted by the Utah Supreme Court as a modification of its decisions upholding the common law rule of ownership of percolating waters. Immediately following the quotation the court is careful to restrict its decision to the particular case in hand and the opinion, after quoting from Kinney, closes with the following words:

> "Nor is this decision intended to apply to what are known as artesian or subterranean waters, the sources of which lie deep beneath the earth's surface. Nor is the doctrine herein announced in any way in conflict with any of the former decisions of this court."

From the foregoing quotation it must be evident that the Circuit Court of Appeals failed to read the **Rasmussen** decision, but accepted statements and quotation found in counsels' brief.

**Ownership of Tunnel**: In the "Statement of the Case" made by the respondents, the insinuation is made that the waters in dispute do not come from petitioner's land, and the following sentence appears on that page:

> "What right or title petitioner has in or to the land on which the water was encountered does not appear either in the pleadings or in the evidence."

In paragraph 3 of the complaint, plaintiff alleges that it "is the owner and entitled to the possession of the said tunnel and of the water issuing therefrom." (Record, page 2.)

In the answer defendants, at paragraph 3, admit the plaintiff's ownership of the tunnel but deny that plaintiff is the owner of the water issuing from the tunnel. (Record, page 7.) This admission obviated the necessity of the introduction of any evidence respecting the ownership of the tunnel and is a sufficient answer to the insinuation made by counsel on page 4 of their brief.

**Inadvertence of Court of Appeals:** At page 6 of their brief, counsel for respondents admit that the Circuit Court of Appeals "inadvertently assumed that the trial court had imposed upon respondents (defendants below) the burden of proof," but say that this inadvertence is one from which petitioner can derive but little comfort.

In calling this manifest error to the attention of this court in connection with the error committed by the Circuit Court of Appeals in holding that the Supreme Court of the State of Utah had overruled its former decisions respecting the common law doctrine of the ownership of percolating waters, we did so for the purpose of disclosing to this court **the lack of care** with which the Circuit Court of Appeals considered the opinion of the lower court in this case, and we think we have clearly demonstrated in our brief heretofore filed that the decisions of the Supreme Court of the State of Utah received no more careful consideration by the Circuit Court of Appeals than did the opinion of United States District Judge Johnson in this case.

**The Statutory Law of Utah is in effect abrogated by the Circuit Court of Appeals' Decision.**

Counsel for respondents have absolutely failed to meet our contention that the decisions of the Circuit Court of Appeals in this case conflicts with and is in derogation of Section 5838, Compiled Laws of Utah, 1917. The argument, commencing on page 9 of respondents' brief, clearly shows an attempt to befog this issue.

It is contended that because the statute above referred to was not adopted until 1899 it "is not applicable to the instant case because whatever rights respondents may have acquired to the waters in controversy were acquired prior to the adoption of that statute." (Respondents' brief, page 9.)

The two decisions cited by counsel on pages 9 and 10 of their brief considered in connection with the authorities which we have cited from the Supreme Court of the State of Utah, are a conclusive demonstration of the soundness of the position which we have taken concerning the conflict of the decision of the Circuit Court of Appeals in this case with the statutory law of Utah.

In **Thomas v. Union Pacific R. R. Co.**, 1 Utah 232 (cited at page 9 of respondents' brief), the following language is quoted:

> "Although the common law has not been adopted in this Territory by any Statute, we entertain no doubt that it should be regarded as prevailing here, *so far as it is not incompatible with our situation and government*, and that it is to be resorted to as furnishing to that extent the measure of personal rights and the rule of judicial decision." (Italics by counsel for respondents.)

In the other case, **First National Bank of Utah v. Kinner**, 1 Utah 100, counsel quote the following from the opinion of the Supreme Court of Utah:

> "The people of Utah tacitly agreed upon maxims and principles of the Common Law, *suited to their condition*, and consistent with the Constitution and Laws of the United States, and these only wait the recognition of the Courts to become the Common Law of the Territory. *When so recognized, they are laws as certainly as if expressly adopted by the law-making power.*" (Italics by counsel for respondent.)

Let us now consider the foregoing declarations of the Supreme Court of the State of Utah in connection with the legislative acts of the Territory and State of Utah and subsequent decisions of that court.

It is not and cannot be contended that the Supreme Court of the State of Utah in certain of its decisions which we have cited in our original brief, did not adopt the common law rule respecting the ownership of percolating waters. The rule was first announced in **Sullivan v. Mining Co.**, 11 Utah 438. This case was decided in 1895. It was then announced in **Crescent Mining Co. v. Silver King Mining Co.**, 17 Utah 444. This case was decided in August, 1898.

Under the authorities cited by counsel for respondents above referred to, it must therefore be concluded that the common law doctrine of percolating waters was found by the Supreme Court of the State of Utah to be "suited to conditions" prevailing in the State of Utah and "not incompatible with our situation and government."

The Supreme Court of Utah having thus adopted the common law rule of percolating waters, under its decision in 1 Utah 100, quoted by counsel for respondents in their brief, that law became the law of this state—a rule of property—"as certainly as if expressly adopted by the law-making power."

But we are not required to rest our case upon the adoption of the common law rule by the Supreme Court of the State, for six months after the decision of the Supreme Court in **Crescent Mining Co. v. Silver King Mining Co.**, clearly and unequivocally laying down the common law rule of percolating waters, the people of the State of Utah through their legislature adopted the statute establishing the common law in the State of Utah, which we claim is in effect abrogated by the decision of the Circuit Court of Appeals in this case.

The common law rule of percolating waters has therefore prevailed in Utah from the time it was first announced by the Supreme Court of Utah in **Sullivan v. Mining Co.** in the year 1895 down to the present time. The people of the State of Utah through their legislature and their Supreme Court enjoyed and exercised the right to adopt this principle of the common law, thereby making it a rule of property, and as such it became and should remain binding upon the federal courts exercising jurisdiction over property rights controlled by the laws of Utah.

We quoted the language of this court in **Mormon Church v. United States**, 136 U. S. Rep. 1, in which this court held that it is apparent from the organic act passed Septem-

ber 9, 1850, that the system of common law and equity which generally prevails should be operative in the Territory of Utah, *except as it might be altered by legislation.* Instead of in any manner altering the common law rule respecting the ownership of percolating waters, the Supreme Court of Utah and the legislatures of Utah have expressly adopted that rule and it is and should remain binding upon the federal courts until repealed by the legislature. Indeed, *it is not only binding upon the federal courts but it is binding upon the Supreme Court of the State of Utah until repealed by the people of Utah through direct action of their legislature.*

At the time the waters of Snake Creek were appropriated by the respondents and their predecessors, no law had been adopted by the legislatures of Utah providing for the appropriation of water and their rights attached only because of the common usages and customs of the people of the state, under which the act of diverting surplus water amounted to a claim of title and it was not until 1888 that the legislature of Utah adopted an act relative to the appropriation of water, which is referred to in counsels' brief at page 22. The right thus obtained was always subject to and dominated by the common law rule of ownership of percolating waters.

That the people of the State of Utah have been satisfied with the common law rule of ownership of percolating waters as laid down by its Supreme Court, becomes clearly apparent from a study of the acts of the legislatures of the State of Utah, which we now refer to in brief.

In thirteen sessions of the legislature following the adoption of the statute in 1888, the legislature has had before it for consideration the question of appropriation of waters and never has the legislature seen fit to repeal or modify the common law rule of ownership of percolating waters in this State. On the contrary all of the acts which will now be referred to show that the legislatures of the State of Utah have deemed this common law rule to be essential for the welfare of the people of this State.

In 1903 a very comprehensive act covering twenty-five pages, was adopted by the legislature of Utah as Chapter 100, and entitled "Water Rights and Irrigation." In that act Section 47 reads as follows:

> "The water of all streams and other sources in this State, whether flowing above or underground, *in known or defined channels,* is hereby declared to be the property of the public, subject to all existing rights to the use thereof." (Our italics.)
>
> Laws of Utah, 1903, page 101.

It will be noted that the legislature refers to underground waters, but only such underground waters as run *"in known or defined channels."* Is this not a clear demonstration that the legislature of Utah deemed it wise not to interfere with the common law rule of ownership of percolating waters as laid down by the Supreme Court of Utah? And is it not conclusive that subterranean percolating waters not found *"in known or defined channels"* are intended by the Utah legislature to remain the private property of the owner of the soil?

This same section, copied verbatim, was carried into

the following subsequent enactments by the legislature of the State of Utah:

> As Section 47 of Chapter 108, entitled, "Water and Water Rights," of the Laws of Utah, 1905, page 159;
>
> As Section 1 of Chapter 67, entitled, "Water and Water Rights," of the Laws of Utah, 1919, page 177.

So that up to the very last session of the Utah legislature only waters flowing *"in known or defined channels"* were the subject of appropriation. All others were and are private waters.

In 1913, by the provisions of Chapter 36, the State Board of Land Commissioners was authorized to conduct experiments in sinking wells and other methods for obtaining *subterranean waters* for culinary purposes on the arid lands within the State.

Laws of Utah, 1913, page 48.

In 1917 the legislature adopted Chapter 126, entitled *"Conservation of Underground Waters."*

Laws of Utah, 1917, page 430.

This act was adopted "for the purpose of conserving the underground waters for the State of Utah and to protect the soil in the vicinity of artesian wells from being saturated," and fixed a duty upon the County Commissioners in the several counties to enact rules and regulations governing the period of flow from water developed through artesian wells, requiring records and data to be kept and authorizing the capping of wells in order to prevent the waste of the subterranean waters.

The question of *underground waters,* therefore, was before the legislature frequently, but no law was ever enacted modifying in the least the common law rule of ownership of percolating waters as it has existed in Utah.

Laws respecting water rights were enacted by the legislatures of Utah as follows:

Laws of Utah, 1892, Chapter LXXV, page 91, various clauses relating to water rights.

Laws of Utah, 1897, Chapter LII, page 219, entitled "Water Rights and Irrigation," the first act of the legislature prescribing the method in which water might be appropriated. The act covers seventeen pages.

Laws of Utah, 1901, Chapter 125, page 141, prescribing the duties of the state engineer with respect to measurements of streams and water rights, creating water districts, providing for water commissioners, fixing their duties, and requiring appropriators of water to perform certain acts.

Laws of Utah, 1903, Chapter 100, page 88, entitled "Water Rights and Irrigation," covering twenty-five pages, being the act hereinabove referred to and fixing in general the manner in which water may be appropriated, the rights of appropriators, etc.

Laws of Utah, 1905, Chapter 108, page 145, entitled "Water Rights and Irrigation," in effect a re-enactment of the law of 1903, with amendments.

Laws of Utah, 1907, Chapter 156, page 248, entitled "Water Rights and Irrigation," amending certain sections theretofore adopted.

Laws of Utah, 1909, Chapter 62, page 84, entitled "Irrigation and Water Rights," amending eleven sections adopted by former legislatures.

Laws of Utah, 1911, Chapter 103, page 143, entitled "Unappropriated Water," amending acts theretofore adopted, prescribing the manner in

which water may be appropriated. This act was followed by Chapter 104, page 145, of the same book, amending acts theretofore adopted by the legislature respecting water rights.

Laws of Utah, 1913, Chapter 36, page 47, the act relating to subterranean waters hereinabove referred to.

Laws of Utah, 1915, Chapter 83, page 117, entitled "Appropriation of Water," and Chapter 84, entitled "Irrigation and Water Rights Commission," page 119, amending acts theretofore adopted respecting water rights.

Laws of Utah, 1917, Chapter 126, page 430, entitled "Conservation of Underground Water," hereinabove referred to.

**Water Commission appointed in 1918 to investigate water rights and recommend changes to legislature of 1919.**

Also Chapter 37, page 109, entitled "Water Rights Commission," Laws of Utah, 1917, appointing a Commission, prescribing among others the following duties: "To make a careful and complete investigation of the conditions existing throughout the State with respect to irrigation and water rights with a view of ascertaining what changes in the present irrigation and water rights laws are expedient and desirable.

To study and investigate the irrigation and water rights laws of other states with a view of ascertaining their practicability.

To make a report of their investigations to the thirteenth session of the legislature, and recommend such changes in the present irrigation and water right law as, in their judgment, will improve conditions existing throughout the State, such report to be printed in pamphlet form and a copy thereof mailed to each member of the State

Legislature and to each member-elect on or before December 15, 1918.

As a part of its report, the Commission shall prepare a bill covering the appropriation, adjudication and administration of water rights within the State of Utah, which said bill shall be in complete form for introduction in the thirteenth session of the legislature."

It is fair to assume that the commission appointed by the legislature for the express purpose of investigating "the conditions existing throughout the State with respect to irrigation and water rights," in order to enable them to recommend such changes as in their judgment "would improve conditions existing throughout the State," would know of the common law rule of ownership of percolating waters as adopted by the Supreme Court of Utah, and if it deemed it advisable in its report would recommend an enactment by the next legislature of a law which would modify or abrogate the common law rule of ownership of percolating waters in this State.

Attention is called to the fact that the instant case was on trial in Salt Lake City before the United States District Court from May 27th to July 8th, 1918, and in December, 1918, decision rendered by Judge Johnson in favor of the plaintiff and against the defendants upholding the common law doctrine of percolating waters. (See Record, page 39.) This was just the time when the commission above referred to was at work.

Chapter 67, entitled "Water and Water Rights," Laws of Utah, 1919, page 177, covering 26 pages, and

Chapter 68, entitled "Irrigation Districts," page 204, covering 37 pages, and rewriting the entire law respecting water and water rights and the appropriation thereof, were enacted by the legislature during its session of 1919, presumably pursuant to the report of the commission appointed in 1917.

*The common law doctrine of percolating waters was in no manner modified or affected by any of these acts.*

The Water Rights Commission appointed under the act of the legislature adopted in 1918, above referred to, in its report, which became a public document of the State of Utah under the act creating the commission, recommended the adoption of an act which would make the water of all streams and other sources, whether on or under the ground, public property, but the legislature refused to accept the recommendation of the commission in this respect and provided only that the water of all streams and other sources "in known or defined channels," should be public property.

The foregoing, it would seem to us, clearly and conclusively demonstrates that the people of the State of Utah prefer the common law rule of percolating waters remain undisturbed, however much the so-called American rule may appeal to the people or the courts of other states of the United States.

As we pointed out in our original brief, the State of Kansas has provided for the appropriation of subterranean waters for irrigation purposes (see page 24, our brief). No doubt the commission appointed by the legis-

lature in 1917 considered that act of Kansas, but if so, either it or the legislature of the State of Utah did not consider it wise for this State to adopt any such act.

**United States District Judge Johnson's Conclusion:** At page 17 of their brief counsel for respondent contend that there is no justification in the opinion as handed down by Judge Johnson, for our assertion that he concluded that the common law rule prevailed in Utah. In answer to this statement we need only refer to his opinion in which he analyzes the various decisions of the Supreme Court of the State of Utah, and, after doing so, concludes the opinion with the following words:

> "I am of the opinion that the common law rule respecting percolating waters should be applied in this case to the water flowing in and from the tunnel." (See Record, page 39.)

**Utah Statute Authorizing Appropriation of Water:** Reference is made by counsel to Section 2780 of the Laws of Utah, 1888, providing for the appropriation of water and subparagraph 1 of the section is italicized by counsel. The act confers a right to one who uses unappropriated water from any natural stream, water course, lake or spring, "or other natural source of supply." That the words "or other natural source of supply" do not confer a right to appropriate subterranean percolating waters is clear from the text under the *ejusdem generis* rule of interpretation, and is also made manifestly clear by the subsequent enactments of the legislature of Utah hereinabove referred to, declaring all waters whether surface or un-

derground to be public property when flowing "in known or defined channels."

This is also made clear by the language of the Supreme Court of the State of Utah in **Sullivan v. Mining Co.**, 11 Utah 438, quoted at page 23 of counsels' brief, as follows:

> "This right of an appropriator is, of course, subject to the rule of law which will permit the owner to sink an adjoining well on his own premises, although he should thereby dry up that of the first appropriator."

**Two Distinct Lines of Decisions in Utah:** Counsel do not attempt to dispute the statement in our original brief that there are in Utah two distinct lines of decisions relating to percolating waters, one referring to subterranean waters arising from *natural* causes and the other referring to seepage waters *artificially* produced, and they do not give this court the benefit of any theory which they may entertain that the two lines of decisions depend at all one upon the other. Neither do they attempt to answer our argument that the **Rasmussen** case, relied upon by the Circuit Court of Appeals, relates solely to the line of decisions respecting seepage waters *artificially* produced and in no way modifies the decisions of the Supreme Court of the State of Utah establishing and upholding the common law doctrine of percolating waters, as it relates to subterranean percolating waters arising from *natural* causes. Indeed, counsel state, on page 33 of their brief, that **Garns v. Rollins**, "has no bearing upon the question presented in this petition." The same admission is made

at page 36 of their brief respecting the decisions of the Supreme Court of Utah in **Roberts v. Gribble**, 43 Utah 411. The **Rasmussen** case is a case which relates to seepage waters *artificially* produced exactly as the **Roberts-Gribble** and the **Garns-Rollins** cases do, and counsel should be frank enough to admit this, but instead of so doing contend at page 37 of their brief that the **Rasmussen** decision commits the Supreme Court of Utah to the so-called American doctrine. They commend the Circuit Court of Appeals, at page 47 of their brief, for not referring to the limitations of that decision expressly stated therein by the Supreme Court in three different places.

The Supreme Court of Utah stated that the **Rasmussen** case, the **Roberts-Gribble** case and the **Garns-Rollins** case, are as different from its former decisions upholding the common law rule of percolating waters as night is from day.

The **Rasmussen** decision was misconstrued by the Circuit Court of Appeals exactly as Judge Johnson's decision in the instant case respecting the burden of proof was misconstrued by the Circuit Court of Appeals, and we now look to this Honorable Court to grant the petition for a writ of certiorari in order that the conflict between two jurisdictions might be harmonized and the will of the people of the State of Utah as written through the opinions of its Supreme Court and the enactments of its legislature re-established as the law of the Federal jurisdiction as it now is the law in the State courts.

We refrain from entering into a discussion with counsel respecting the decisions of the courts of other states,

which are cited and quoted from. They have absolutely nothing to do with the question at issue. It is wholly immaterial what the people of other states may do respecting property rights within those states,—people of the State of Utah have the right to determine for themselves what rule of property shall prevail within their jurisdiction. They have done so, and we insist that the rule thus established should be enforced in the Federal courts in so far as they affect property rights within the confines of the State of Utah.

**Mr. Justice Thurman:** At page 38 of their brief, counsel for respondent make reference to the statement contained in our original brief that Mr. Justice Thurman, who was formerly connected with this case, wrote the opinion in the case of **Stookey v. Green**, and misconstrue entirely our purpose and intention in making this reference to Mr. Justice Thurman.

The reason for calling this Court's attention to the fact that this opinion was written by Mr. Justice Thurman, was to show that while as an advocate maintaining the cause of his clients, he contended for the American doctrine before Judge Johnson, yet after being elevated to the Supreme bench of the State of Utah he felt impelled to write the excerpt which we quote on page 19 of our brief, as follows:

> "If it is private land and the water is percolating as known and understood at the common law, then it is not the subject of appropriation as against the owner of the land."

To our minds this was a demonstration that even Mr. Justice Thurman, who had contended before the United States District Court that his clients were entitled to these waters, felt that the common law rule of ownership of percolating waters had been adopted by the Supreme Court of this State, and therefore inserted the sentence above quoted in the opinion which he wrote in the case of **Stookey v. Green.** Our reference to him therefore must in no sense be construed as a criticism, for it was not so intended. It was complimentary in the highest sense of the term and was so intended.

It is submitted that the petition for writ of certiorari should be granted as prayed for.

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ANDREW HOWAT,
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Of Counsel.

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Service of a copy of the foregoing reply brief accepted this ..... day of April, 1921.

A. B. IRVINE,
SAM D. THURMAN,
Solicitors for Respondents.

No. 880

# In the Supreme Court of the United States

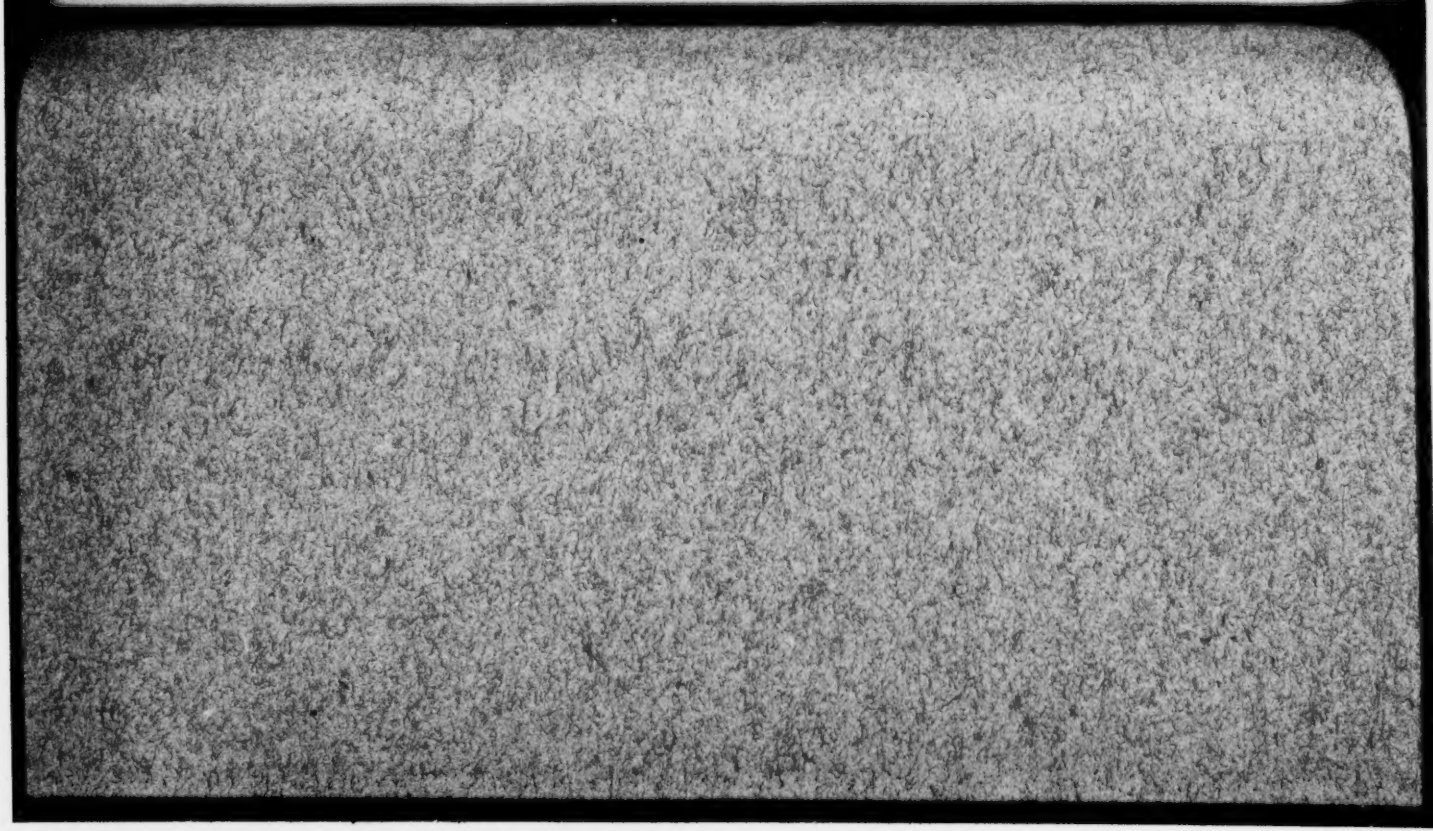
OCTOBER TERM, 1920

SNAKE CREEK MINING AND TUNNEL COMPANY, a Corporation,
Petitioner,
vs.
MIDWAY IRRIGATION COMPANY, a Corporation, and WILFORD VAN WAGENEN,
Respondents.

## Respondents' Brief on Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

A. B. IRVINE,
Solicitor for Petitioner.

SAM D. THURMAN,
Of Counsel.



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OCTOBER TERM, 1920

SNAKE CREEK MINING AND TUNNEL COMPANY, a Corporation,
Petitioner,
vs.
MIDWAY IRRIGATION COMPANY, a Corporation, and WILFORD VAN WAGENEN,
Respondents.

**Respondents' Brief on Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.**

Petitioner bases its request for a writ of certiorari upon the following grounds:

I. That the decision of the Circuit Court of Appeals conflicts with and is repugnant to Sec. 5838, Compiled Laws of Utah, 1917.

II. That the decision of the Circuit Court is in conflict with decisions of the Supreme Court of Utah.

III. That the rights involved are of great public

concern to the United States, as well as to the mineral states, for the reason that said decision will result in prohibiting the opening and working of mineral lands both government and private.

IV. That the court erred in holding the burden of proof was on plaintiff.

V. That the court erred in not holding that plaintiff had increased the flow of water in Snake Creek.

Respondents take issue with petitioner on each of these grounds, and in the following pages will briefly discuss them in the order in which they appear in petitioner's brief.

Before beginning such discussion, however, it is thought that some light will be thrown on the situation by a brief review of some of the situation as disclosed by the pleadings and the evidence.

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## STATEMENT OF THE CASE.

The village of Midway is situated in a valley surrounded by mountains, having an elevation of between 10,000 and 11,000 feet. The master drainage depression in the mountains nearest the town is known as Snake Creek Canyon, and out of this canyon flows Snake Creek, the stream involved in this litigation. The stream heads in seeps and springs up in the tops of the mountains, and gradually increases in size as it moves down towards the mouth of the canyon, being fed and augmented in its course by some small tributaries, and by the springs and seeps from the neighboring hills and canyons. After the spring "run off" (caused by the melting snows), prac-

tically the entire flow of the stream is made up from waters finding their way into the master drainage depression from springs and seeps fed from the waters which have been stored in the bosom of the mountains. During the period of precipitation,—which in the arid west occurs almost entirely during the winter months,—the mountains become saturated, and after the surface run off, the mountain streams, such as Snake Creek, are fed entirely, during the irrigation season, from the water which has thus saturated the hills, and which find its way by percolation through the crevises and through the soil into the streams. The valleys are barren and unproductive without artificial irrigation—with such irrigation they are fruitful and capable of producing abundant crops.

Recognizing this condition the original settlers located on both sides of the stream at the mouth of Snake Creek Canyon, and built the town of Midway. It is a fact admitted by the pleadings in this case, that they appropriated *all of the waters of Snake Creek*—the appropriation being accomplished in conformity with the local laws and customs, and under authority of the then existing laws of the then Territory of Utah, and the statutes of the United States then in force. These statutes and laws are referred to and discussed in another subdivision of this brief. (Pages 21-2.) Just when the water was first diverted and applied to a beneficial use does not fully appear from the record, but it does appear that some of the water was diverted and used prior to 1872, and it is conceded that all of the water was appropriated, diverted,

and applied to a beneficial use more than twenty-five years prior to the commencement of this litigation. The Midway Irrigation Company is an association of farmers owning this water, organized for the purpose of controlling, diverting, and delivering the same to its members.

With this situation existing, the petitioner acquired title to a square quarter section of land in Snake Creek Canyon, said land lying on each side of Snake Creek. (See paragraph two of plaintiff's complaint, transcript page one. Also, topographic plat of Snake Creek watershed, transcript page 466.) Petitioner then commenced the construction of its tunnel, the portal of which is situated near the center of said quarter section. The tunnel extended beyond the boundaries of petitioner's said land, and into the watershed of Snake Creek, a distance of in the neighborhood of 15,000 feet. No part of the waters in controversy in this case were encountered within the boundaries of petitioner's said quarter section, and all of the waters flowing from the tunnel, entered the tunnel beyond the boundaries of said land. What right or title petitioner has in or to the land on which the water was encountered does not appear either in the pleadings or in the evidence. The water issuing from the portal of the tunnel flows a distance of about 2,000 feet back into the natural channel of Snake Creek at a point far above respondents' first place of diversion.

Respondents (defendants below) claim to be the owners of this water by virtue of their prior appropriation of all of the waters of Snake Creek, their contention being that the waters of the tunnel are a part of the

waters of said creek. The gist of respondents' contention, as far as their claim of title to the waters is concerned, is that petitioner's tunnel was driven into the mountain in the immediate vicinity of Snake Creek and its tributaries, the waters of which had all been appropriated by respondents, and that the tunnel so driven underground cut off and diverted springs and seepages constituting the permanent sources of supply of the waters of the creek, thereby causing said waters to flow into and out of the tunnel whence they emptied into and were restored to the creek. It is contended by respondents in both the pleadings and the evidence, and is found as a fact by the courts below, that the waters of the tunnel, when restored to the creek, do not increase the usual or ordinary supply thereof, and that therefore petitioner herein is not entitled to the water so collected by means of the tunnel. It is alleged by respondents, and admitted by the petitioner herein, that the water in controversy is valuable for irrigation, power and domestic purposes. *The petitioner herein (plaintiff below) does not require the water for any purpose in connection with its property, or for mining purposes,* but, recognizing its value for irrigation, seeks to make merchandise of the water by selling it to others (see Par. 9 of complaint, Tr. p. 3), who propose to conduct same through intermediate channels to the proposed place of use, forty or fifty miles away, in another valley and into an entirely different watershed. Each of the parties seeks to have its title to the water established and confirmed.

At the outset of its brief, petitioner calls attention to two alleged errors appearing in the opinion of the Court of Appeals, as follows:

> "*First:* The Court of Appeals, in opening its opinion, states that the lower court reached its conclusions that the plaintiff was entitled to the water of the tunnel, on the ground that the burden of proof was on the defendants to show that the waters in the tunnel were derived from subterranean waters which flowed into the creek.
>
> *Second:* The Court of Appeals, in its opinion, cites two late cases of the Supreme Court of the State of Utah, as authority for the conclusion that the Supreme Court of Utah had abandoned the common law rule, and had adopted the so-called American rule."

Answering the first alleged error, respondents admit that the Circuit Court of Appeals inadvertently assumed that the trial court had imposed upon respondents (defendants below) the burden of proof as to their ownership of the water flowing in the tunnel. Concerning the burden of proof the trial court found that the facts of this case brought it within the principle enunciated in the Mountain Lake case (47 Utah 346), and therefore held that the burden was on petitioner (plaintiff below) to prove that it had developed water which had not been theretofore appropriated by others. This inadvertence, however, on the part of the Circuit Court of Appeals, is one from which petitioner can derive but little comfort. Its holding upon this question is exactly the same as that of the trial court. It places the burden on the petitioner —the Tunnel Company—and that is precisely where it should be placed in cases of this kind.

Petitioner further, in reference to this question, on page 13 of its brief, says:

> "All that was said by the trial court respecting burden of proof was therefore dictum."

In view of the fact that the question as to who had the burden of proof respecting the matter referred to. was a controverted question from the beginning to the end of the trial, was argued and re-argued in every brief that was filed, and in the last analysis was necessary to a final determination of the case, we are constrained to believe that counsel for petitioner must have intended that the language last quoted should be understood in a Pickwickian sense. It will be noted in more places than one in counsel's exceedingly able brief, that dictum becomes good law, and good law becomes dictum, according to whether it is for or against their contention. As a notable example, see Sullivan vs. Mining Company, relied on by both parties, and cited by petitioner and commented on in its brief, pages 26 and 27. We venture to say that this court will hardly be able to identify the opinion in the Sullivan case by anything appearing in petitioner's brief, not that counsel have stated matter not appearing in the opinion, but because they have by an unpardonable oversight omitted to touch the question actually decided, while quoting with the most scrupulous care statements of the court entirely outside of the issues involved.

The same is true to a greater or less extent in the very next case cited by counsel in their brief at page 27, Crescent Mining Company vs. Silver King Mining Com-

pany. In that case counsel quote four pages of the court's opinion, when as a matter of fact there was not a single question involved in the case that could, by any reasonable possibility, be a subject of serious dispute among fair-minded men in this or any other enlightened community. Nearly all of the Utah cases cited by petitioner are subject to the same criticism, in that the cases themselves are wholly inapplicable to the present condition, or the matter relied on in the cases cited has no connection with the question presented for determination. But as these cases, as well as the question as to the burden of proof, will receive a more extended notice before we conclude our discussion, we will refrain from further comment upon them at this time.

As far as the second alleged error is concerned, the two Utah cases speak for themselves when read and considered in connection with other Utah cases, to which reference was made by petitioner in its brief, and to which reference will be made hereafter.

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In the discussion of the several grounds relied upon by petitioner, quoted in substance at the commencement of this brief, the first and second grounds are considered together, and they will therefore be dealt with by respondents in the same manner.

I-II.

It is contended by petitioner that the decision of the Circuit Court of Appeals sought to be reviewed, not only conflicts with the decisions of the Supreme Court of Utah, but also is in derogation of Section 5838, Compiled Laws of Utah, 1917, which reads as follows:

> "COMMON LAW IN FORCE. The common law of England, so far as it is not repugnant to, or in conflict with the Constitution and Laws of the United States, or the constitution and laws of this state, shall be the rule of decision in all the courts of this state."

It is admitted by petitioner in its brief (page 7) that the statute just quoted was adopted by the Utah Legislaure in 1899. The only comment we have to make in respect to this statement, is that if the common law was not adopted until 1899, then it is not applicable to the instant case, because whatever rights respondents may have acquired to the waters in controversy were acquired prior to the adoption of that statute.

The early decisions of the Supreme Court of the State of Utah clearly held that only such provisions of the common law were considered as prevailing in Utah, as were not incompatible or inconsistent with its situation and government.

The case of Thomas vs. The Union Pacific R. R. Company, 1 Utah 232, considered the extent to which the common law had been adopted in the State of Utah. This case arose in 1869, and we quote from page 234 of the court's decision:

> "Although the common law has not been adopted

> in this Territory by any Statute, we entertain no doubt that it should be regarded as prevailing here, *so far as it is not incompatible with our situation and government,* and that it is to be resorted to as furnishing to that extent the measure of personal rights and the rule of judicial decision." (Italics ours.)

In another case, First National Bank of Utah vs. Kinner, I Utah 100, reference was also made to the extent to which the common law had been adopted in the State of Utah. One paragraph of the syllabus reflects the decision of the court, and we quote it in its entirety:

> "No specific body of the Common Law was transplanted to the Territory of Utah by the fact of emigration. Neither has the Common Law been extended over the Territory by the Treaty of Guadalupe Hidalgo, and but one course has been left open, to-wit, for the whole body of the people to agree expressly or tacitly upon a common measure. The people of Utah have tacitly agreed upon maxims and principles of the Common Law, *suited to their condition,* and consistent with the Constitution and Laws of the United States, and these only wait the recognition of the Courts to become the Common Law of the Territory. When so recognized, they are laws as certainly as if expressly adopted by the law-making power." (Italics ours.)

In Stowell vs. Johnson, 7 Utah 215, a more extended reference to which will be made hereafter, in dealing with a question involving a common law right to the use of water, the court held that the common law doctrine in respect to the rights in controversy should not prevail as against a claim of right under the law of appropriation.

The statute above quoted, adopting the common law, was adapted from the Political Code of California, Section 4468.

In Katz vs. Walkinshaw, 74 Pac. 766, the California Supreme Court had occasion to consider that statute and the common law doctrine that percolating waters belong to the owner of the soil, and, notwithstanding a long line of decisions supporting such doctrine, and the statute in question, came to the conclusion that the common law doctrine was utterly incompatible with conditions existing in that state. That was a case of far reaching importance, and was decided only after a most careful and thorough consideration of the questions involved upon a rehearing. Owing to the importance of the case, on re-hearing divers parties who were not parties to the original suit, were permitted to appear and file briefs and make arguments. As indicating the thoroughness of the hearing and the care with which the questions involved must have been presented to and considered by the court, we quote the following:

> "A re-hearing was granted in this case for the purpose of considering more fully, and by the aid of such additional arguments as might be presented by persons not parties to the action, but vitally interested in the principle involved, a question that is novel and of the utmost importance to the application to useful purposes of the waters, which may be found in the soil. * * * Able and exhaustive briefs and opinions have been filed on the hearing. The principles decided by the late Justice Temple in the former opinion, and the course of reasoning by which he arrives at the conclusion, have been attacked in these several

> briefs and petitions with much learning and acumen. * * * Many arguments, objections and criticisms are presented in opposition to the rules and reasoning of the former opinion. It is contended that the rule that each landowner owns absolutely the percolating waters in his land with the right to extract, sell, and dispose of them as he chooses, regardless of the result to a neighbor, is a part of the common law, and as such, has been adopted in this state as the law of the land by the statute of April 13, 1850 (Stats. 1850, 219), and by Section 4468 of the Political Code, and that consequently it is beyond the power of this Court to abrogate or change it; that the question comes clearly within the doctrine of *Stare Decisis;* that the rule above stated has become a rule of property in this state upon the faith of which enormous investments have been made, and that it should not now be departed from, even if erroneous; that even if the question were an open one the adoption of the doctrine of correlative rights in percolating waters would hinder or prevent all further developments for use of underground waters and endanger or destroy developments already made, thus largely restricting the productive capacity and growth of the state, and that therefore a sound public policy and regard for the general welfare demand the opposite rule."

From the foregoing quotation it will be observed that the owner of the ground claiming the percolating water therein, and many other parties who were permitted to file briefs and who were interested in the same manner, made all of the contentions and advanced all of the arguments that have been made and advanced by the petitioner, in the case at bar. They claimed the water under the common law rule; they claimed it under the statute;

they claimed it under modifications of the common law rule; they claimed it under the doctrine of *Stare Decisis*, claiming that the common law rule had become the rule of property in the state, and that it should not be departed from even if erroneous, and they claimed that the doctrine of correlative rights would hinder or prevent the growth of the state, and therefore that a public policy demanded the adoption of the common law rule. The court reviewed the authorities and discussed the difference between conditions in the arid west and those existing where the common law doctrine had its origin, and discussed what would be the consequences of following the common law rule in the arid west, and then referring to that rule, on page 769, states its conclusion in the following language:

> "The difficulties to be encountered must be insurmountable to justify the adoption or continuance of a rule which brings about such consequences."

Further speaking of the common law rule, and of the arguments that have been advanced in support of the same, the court proceeded to point out the absurdity of the common law rule and show that under that rule one landowner could even deprive his neighbor of the right to water percolating in his land.

After disposing of the arguments in support of the common law rule, the court took up the question of the doctrine of *Stare Decisis* and the argument that had been advanced that the common law rule had become the rule

of property in that jurisdiction, and disposed of this question in the following language: (See page 771.)

> "In view of this conflicting and uncertain condition of the authorities, it cannot be successfully claimed that the doctrine of absolute ownership is well established in this state. It is proper to state that in all the opinions which have so readily quoted and approved the supposed common law, that injuries from interference with percolating waters were too obscure in origin and cause, too trifling in extent and relatively of too little importance, as compared to mining industries and the wants of large cities to justify or require the recognition by the court of any correlative rights in said waters. It is also to be observed that in some instances in the Eastern states mentioned in the former opinion in this case, the injustice from the diversion of percolating waters has been so glaring and so extensive that the court there was compelled to depart from its previously decided cases and recognize the rights of adjoining owners. We do not see how the doctrine contended for by defendant could ever become a rule of property of any value."

The case of *Meeker vs. City of East Orange*, 77 N. J. L. 723; 134 Am. St. Rep. 798; 25 L. R. A. (N. S.) 464, is an interesting and well-reasoned case in which the opinion is written by Mr. Justice Pitney, now of the Supreme Court of the United States. The issue between the English or common law rule and the American or reasonable use rule, was clean cut, and elaborate briefs submitted by both sides are contained in the report of the case published in 25 L. R. A. (N. S.). The court absolutely repudiated the English rule. The first paragraph of the

syllabi (prepared by Mr. Justice Pitney himself), is as follows:

> "The 'English rule' as to property rights in percolating underground water, rejected. The doctrine of 'reasonable user' adhered to."

The plaintiff owned a farm on which there were certain small streams and some springs. The defendant city acquired 680 acres of adjacent land and drove artesian wells thereon, and diverted the water into the city and used it for municipal purposes, expending more than $1,000,000. The waters were percolating underground waters, and no other waters were taken. The plaintiff sought damages for diminution in the supply of water flowing in his springs and in streams, and for reducing the water level in his well. The judgment of the lower court was in favor of the defendant on the theory that defendant had an absolute right to the waters under its land, *and to use said water for purposes entirely unconnected with the beneficial use and enjoyment of that land to the extent of making merchandise out of the water and conveying it to a distance for the supply of the inhabitants of East Orange.* Mr. Justice Pitney reviews the authorities supporting the English rule, commencing with the first case of Acton vs. Blundel, and reaches the following conclusion with reference to same. (p. 471):

> "A review of the reasoning upon which the English doctrine respecting the percolating underground waters rests, will demonstrate, as we think, that this reasoning is unsatisfactory in itself, and

inconsistent with legal principles otherwise well established."

And, after discussing the cases adopting the American rule, the court says:

> "Upon the whole, we are convinced not only that the authority of the English cases is greatly weakened by the trend of modern decisions in this country, but that the reasoning upon which the doctrine of 'reasonable user' rests, is better supported upon general principles of law, and more in consonance with natural justice and equity. We, therefore, adopt the latter doctrine. This does not prevent the proper user by any landowner of the percolating waters sub-jacent to his soil in agriculture, manufacturing, irrigation or otherwise, nor does it prevent any reasonable development of his land by mining or the like, although the underground water of neighboring properties may thus be interfered with, or diverted; but it does prevent withdrawal of underground waters for distribution or sale for uses not connected with any beneficial ownership or enjoyment of the land, whence they are taken, if it thereby result that the owner of adjacent or neighboring land is interfered within his right to the reasonable user of subsurface water upon his land, or if his wells, springs or streams are thereby materially diminished in flow or his land is rendered so arid as to be less valuable for agriculture, pasturage or other legitimate uses."

On page 26 of petitioner's brief, we find the following statement:

> "The United States District Judge Johnson, in his opinion filed in this case, reviewed all the decisions of the Supreme Court of Utah up to the time of filing his opinion (December, 1918), and

held that the common law rule prevailed in Utah under the decisions of the Supreme Court * * *."

And in various other places throughout petitioner's brief the same thought is repeated. In fairness to Judge Johnson as well as to the respondents in this case, we feel called upon to say that there is no justification whatever for any such statement. What Judge Johnson did say, respecting the decisions of the Supreme Court of Utah, and as to whether that court had adopted the common law rule or not, is found in his opinion (Tr. 25-26), and reads as follows:

> "Much may be said in favor of each of these rules. On the part of the defendant it is urged that the adoption of the common law rule would place the farmer and agriculturist in this arid region at the mercy of the miner and mining interests. On the part of the plaintiff it is urged that a thorough-going adoption of the American rule would seriously interfere with mining development and enterprise in the state. The question thus presented for decision is a matter that, it seems to me, peculiarly concerns the state and its citizens. Its decision intimately affects property rights and is one that ought to be deliberately determined by the Supreme Court of the State. It would be intolerable for this court to adopt one rule, and the state court the other. *It is unfortunate that the Supreme Court of the state has never definitely announced its adherence to either one rule or the other in any decided case. The rights of parties in respect to percolating water have been before the court a number of times. A definite pronouncement with respect to the matters presented in this case for decision is lacking, either by reason of the diversity of views of the mem-*

*bers of the court, or by distinctions made by the court in the cases before it.''*

In reviewing the decisions of the Supreme Court of the State of Utah, the Circuit Court of Appeals arrived at the conclusion that such decisions as a whole do not support the doctrine, as contended for by petitioner, that percolating waters belonged to the owner of the soil, as against one claiming by prior appropriation, but, on the contrary, held that the latest decisions of the Supreme Court of Utah had adopted the American rule. (Tr. 480.) The Circuit Court of Appeals therefore decided the case in favor of the respondents and directed that their title to the waters be quieted and affirmed.

In our presentation of the case to the Circuit Court of Appeals, we had occasion to review at considerable length all of the Utah cases in any manner involving this question, which cases have been referred to by petitioner in its brief. Our comments, in substance, upon these decisions may well be presented in this connection, with such additional remarks as may be deemed necessary, before concluding this branch of the discussion.

STOWELL VS. JOHNSON.

Stowell vs. Johnson, heretofore referred to, is reported in 7 Utah, page 215. It is one of the oldest cases in the Utah Reports, involving rights to the use of water. This case was only slightingly referred to by petitioner, upon the assumption that the doctrine contained therein is in conflict with the more recent decisions of the Utah Court. In this connection we wish to state that in the course of our investigation, we have had occasion to con-

sider every Utah case bearing upon the question involved in this litigation, and feel authorized to say that there is no case whatever in any manner in conflict with the doctrine laid down in Stowell vs. Johnson. It is true, as stated by counsel for petitioner in their brief, that the question involved was that of riparian rights under the common law. We maintain, however, that riparian rights and rights to percolating water under the common law are companion doctrines and go hand in hand together. Where one exists, the other exists; where one has been modified, the other has been modified, and where one is abolished by reason of custom, statute, law, or incompatibility with conditions requiring irrigation, the other for the same reason has likewise been abolished.

In the *Stowell-Johnson* case, at page 225 of the report, discussing the question relating to riparian rights, the court says:

> "Riparian rights have never been recognized in this territory, or in any state or territory where irrigation is necessary; for the appropriation of water for the purpose of irrigation is entirely and unavoidably in conflict with the common-law doctrine of riparian proprietorship. If that had been recognized and applied in this territory, it would still be a desert; for a man owning ten acres of land on a stream of water capable of irrigating a thousand acres of land or more, near its mouth, could prevent the settlement of all the land above him. For at common law the riparian proprietor is entitled to have the water flow in quantity and quality past his land as it was wont to do when he acquired title thereto, and this right is utterly irreconcilable with the use of water for irrigation.

> The legislature of this territory has always ignored this claim of riparian proprietors, and the practice and usages of the inhabitants have never considered it applicable, and have never regarded it."

Such was the holding of the court in the Stowell-Johnson case, notwithstanding the fact that the alleged riparian rights of defendants in the case vested long prior to the enactment of the territorial law relied on by plaintiff as abolishing riparian rights. It does seem to us that this case is of deep significance in this discussion. We can conceive of no distinction between the common law doctrine of riparian rights and the common law doctrine of rights to percolating water that would justify holding that one is incompatible with conditions requiring irrigation and the other not. It is a matter of common knowledge that streams which are the subject of appropriation are made primarily by water falling upon the surface of the mountains or elevated lands in the form of rain or snow. Large portions of these sink into the earth and constitute percolating water and underground water flowing in well-defined channels. These are the main reliance of those who appropriate the surface stream, because they constitute the main sources thereof. The early water, consisting of melting snow and spring rains, except what sinks into the earth as above stated, soon flow off and disappear. It would seem unreasonable to us, if not absurd, to contend that riparian rights have been abolished in the state because of their incompatibility with physical conditions requiring irrigation and at the same time con-

tend that rights to percolating water should be maintained as against one making a prior appropriation.

SULLIVAN CASE.

Sullivan vs. Mining Company is reported in 11 Utah, page 438. It is a clear, lucid decision of the question submitted to the court, with the exception of a single sentence of *obiter dictum*, upon which counsel for petitioner rely and to which reference has heretofore been made. The facts in that case were as follows:

Sullivan and his grantors or assigns were the owners of a well which they had dug on the public domain and thereby secured a supply of living water which percolated into the well. They used the water for beneficial purposes. After they had used the water for a considerable time, the mining company procured a patent to the land upon which the well was situated, and thereafter claimed the water because it existed in its land in a state of percolation.

Sullivan claimed under the law of appropriation. He relied on the laws of Congress of 1866 and 1870, and also on a law of the Territory of Utah, the pertinent sections of which we quote:

Revised Statutes of U. S., Section 2339 (1866), among other things provides:

> "Whenever by priority of possession rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of said vested rights shall be maintained and protected in the same."

Revised Statutes of U. S., Section 2340 (1870), provides:

> "All patents granted, all pre-emptions or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches or reservoirs, in connection with such water rights, as may have been acquired under or recognized by the preceding section."

Com. Laws, Utah, 1888, Section 2780, in part, reads as follows:

> "A right to the use of water for any useful purpose, such as domestic purposes, irrigating lands, propelling machinery, washing or sluicing ores, and other like purposes, is hereby recognized and acknowledged to have vested and accrued as a primary right, to the extent of any reasonable necessity, to such use thereof under any of the following circumstances: (1) *Whenever any person or persons shall have taken, diverted and used any of the unappropriated water of any natural stream, watercourse, lake or spring, or other natural source of supply.*" (Italics ours.)

After reviewing the statutes of Congress, and of the Territory, above referred to, and after commenting on the position of the mining company, to the effect that the water was not a stream or water course and therefore not subject to appropriation, at page 443 of the report, the court says:

> "We are inclined to give these statutes a much broader construction. In our opinion, wherever the industry of the pioneer has appropriated a source of water, either on the surface or under the public land, he and his successors acquire an easement and right to take and use such water to the

extent indicated by the original appropriation, and that a private owner who subsequently acquires the land takes it burdened with this easement, and we also hold that this easement carries with it such rights of ingress and egress as are necessary to its proper enjoyment."

The court then adds the following dictum, referred to above, which tends to confuse the meaning of the decision:

> "This right of an appropriator is, of course, subject to the rule of law which will permit the owner to sink an adjoining well on his own premises although he should thereby dry up that of the first appropriator."

Petitioner relies upon the language last quoted as a limitation of the scope and meaning of the decision. In our opinion this position is untenable. It would inevitably lead to a bald absurdity. It would absolutely destroy the force and effect of the decision concerning the question to be determined, and, therefore, in our opinion, it could not have been intended as a limitation. Construed as a limitation the effect would be to say to the mining company:

> "You have come into this court claiming a right to certain water. Under the laws of Congress and the laws of the Territory the court cannot grant you relief. The law is all against you, but if you will take your pick and shovel and dig another well into your own land, in close proximity to the well in question, and thereby draw the water from that well into your own, you can by that means obtain that which this court is unable to give."

We strenuously contend that any construction of a court's solemn decision which leads to such conclusion cannot be right. Before accepting such an interpretation we feel it a duty which we owe to the court rendering the decision to see if there is not another solution of the question more consistent with common sense and one which will permit the decision of the court to stand without destructive limitations. As reflecting the manifest meaning of the court, we quote, from page 441 of the report, another excerpt from the same opinion:

> "We are not aware of any case having been decided in this arid region, in which this precise question has been passed upon. The doctrine may be said to be settled that the owner of lands has a right to dig thereon, and to appropriate and use percolating waters therein, although by so doing he may dry up the wells or springs of an adjacent proprietor."

In all fairness to the decision of the court, is not that all that was meant by the dictum to which we have referred? It is not a strained interpretation. It does no violence to any rule of construction. It in no manner limits or modifies the decision as to the actual question tried by the court, but leaves it unimpaired and unqualified as far as its full force and effect is concerned.

The court, in announcing the dictum referred to, departed from the real issues of the case to announce a common-law doctrine, which, if offered in a proper case, might still be the law in this jurisdiction. The right of one landowner to sink a well upon his own land and dry up the well or spring of an adjacent landowner, both

claiming under the common law and *neither claiming under the law of appropriation or doctrine of reasonable use,* is not controverted in this proceeding, notwithstanding we characterize the doctrine which sanctions and permits such right, as illogical and self-contradictory when the reasons upon which the doctrine is founded are carefully weighed and considered.

Without elaborating the view to any considerable extent, it may be said once for all, without the fear of successful contradiction, that the old common law rule as to percolating waters is self-contradictory, extremely parodical, and, whatever may have been its origin, its utter inconsistency is plainly apparent upon the most superficial investigation. *Cujus est solum* as applied to the title of the proprietor in fee is a doctrine of the common law. The proprietor owns all, both above and below the surface of the land, including the surface itself, yet one proprietor by underground works could draw the percolating waters from beneath the surface of his neighbor's land and *damnum absque injuria* would be the only response to his neighbor's application for relief. If he had undermined his neighbor's land and removed and taken therefrom sand, gravel or earth, the law would have afforded an adequate remedy, but not so if by his underground works he draws therefrom the percolating water, no matter how serious the injury. How utterly absurd then must be the common law decisions that undertake to treat the percolating waters beneath the surface the same as they treat gravel, sand and other material. We do not hesitate to say that such arbitrary, inconsistent rule of law in the

determination of sacred rights should find no place in an enlightened system of jurisprudence, and it is extremely gratifying to know that the rule has been practically abolished in nearly every jurisdiction of the country.

THE CRESENT-KING CASE.

The case of Crescent Mining Company vs. Silver King Mining Company, 17 Utah 444, is relied on by petitioner and cited in its brief at great length. It has no more relevancy to the case at bar than a case in replevin or a suit on a promissory note. *It was not a case between an owner of land claiming the percolating waters found therein and a person claiming by prior appropriation under the law of appropriation or doctrine of reasonable use,* but it was simply a case where the owner of the land developed and claimed percolating waters therein when no one else claimed a prior right.

The case, briefly stated, is as follows: The Silver King Mining Company, its grantors and predecessors in interest, by means of a tunnel driven into one of their mining claims of which they were the patentees, developed a stream of water percolating from the rocks and fissures of the land into which the tunnel was driven. These waters flowed into a depression known as "Shadow Lake." After they had flowed into the lake the plaintiff, Crescent Mining Company, by means of a pipe conducted them to and upon certain mining property of which it was the owner and applied them to a beneficial use. Subsequently the Silver King Company saw fit to use the water upon its own mining claim and diverted it away

before it ran into Shadow Lake. The Crescent Company applied to the court for relief.

Much is said in the opinion as to the common-law doctrine of percolating waters. Much that was said had no relevancy to the issues involved. The dictum referred to in the Sullivan case is quoted and approved. We have no fault whatever to find with the opinion in the Crescent-King case except as above stated. It was a plain, simple case of a mining company excavating a tunnel in its own land for which it had a patent and developing a stream of percolating water *to which no one had, or pretended to have, a prior claim, either by the common law or law of appropriation.* The Supreme Court decided the case in favor of the defendant and could not have decided it otherwise on any possible theory.

THE WILLOW CREEK CASE.

Departing for a few brief moments from the chronological order of the Utah cases, we next refer to the case of Willow Creek Irrigation Co. vs. Michaelson, 21 Utah 248. We make this departure for the reason that we regard the case as on all-fours with the Crescent-King case, which we have just considered.

The Willow Creek Irrigation Company was the owner of a surface stream known as Willow Creek, and used the same for purposes of irrigation. The defendant Michaelson was the owner of patented land in the vicinity of the creek. When she obtained her patent no water had arisen upon the surface of her land. Some time afterwards water did arise thereon in a depression by percolation to such an extent as to overflow the rim of the depression,

when it flowed into Willow Creek and mingled with the waters thereof. The plaintiff used the water for some considerable time, after which the defendant conceived the idea of using it upon her own land. She dammed off the water so it would not reach the creek and appropriated the same to her own use. Plaintiff brought suit. The Court found in favor of the defendant and the Supreme Court affirmed the judgment. The most that can be said of either of these cases is that an appropriation of water under the law of appropriation cannot be made, in the first instance, of water issuing by percolation from land which has been reduced to private ownership. Neither case throws any light upon the issues presented on this appeal.

THE HERRIMAN CASES.

These cases are reported in 19 Utah 458, and 25 Utah 96. There were two trials and two appeals of the same case. One statement will suffice for both. The general nature of the case is the same as the case at bar.

The Herriman Irrigation Company was the owner of all the waters of Butterfield creek as found by the court as they flowed at the point of plaintiff's diversion, about two miles above the town of Herriman in Salt Lake County, Utah. These waters were all necessary for plaintiff's use and had been used by it and its predecessors in interest for a period of more than forty years preceding the commencement of the action. The defendants were engaged in mining, and in the prosecution of their work drove two tunnels into their mining claims in the vicinity of the creek and thereby collected together considerable water seeping, percolating and flowing into

the tunnel from the adjoining ground. The water flowing from the tunnel was turned into the creek and diverted therefrom at a lower point on the stream. It was claimed by the plaintiff that the waters intercepted by the tunnel were a part of the waters of the creek which had theretofore been appropriated by it and its predecessors in interest, and that therefore the defendants were not entitled to the water. The District Court, in the first case, 19 Utah 458, found that plaintiffs had appropriated all the waters of the creek; that during the prosecution of the tunnel some of the springs which supplied the creek had become extinct and others had been diminished, but that the springs were "not the outlet of any subsurface water course or stream having any defined channel connecting them with or extending to or beneath the ground through which said tunnels extend." Other findings are not material here. As conclusions of law the court found that plaintiff was entitled to all the waters naturally flowing in Butterfield creek at its point of diversion; that defendants did not divert any of the waters of said creek belonging to plaintiffs or which it had the right to use; that defendants were entitled to a judgment dismissing plaintiff's complaint. Some contention was made as to the confusion of property by defendants commingling the tunnel water with the waters of the creek. While this question was to some extent controlling in that case it is not material in the case before us. The Supreme Court, among other things, in effect, held that where tunnels are driven, as in that case, and no testimony is offered as to why the springs dried up or became extinct, there is

a presumption that the tunnel cut the underground channels through which the veins of water flow which supply the springs. In the course of its opinion the court interposes a query as to what would be the effect if a party in the proper exercise of dominion over his own real estate should drive a tunnel which dried up springs whose channels are not traceable, but which feed a stream the waters of which had been previously appropriated by another, where the waters were not discharged into the stream but at a point which renders it impossible to restore the same to the stream. The court asks the question, "would not these facts present an instance of *damnum absque injuria?*" After this question the court proceeds:

> "But where the water from such a tunnel is discharged into the stream previously appropriated, a different principle governs. In such a case it would be inequitable to deprive the first appropriator of his original rights, and allow the defendants to take from the stream the waters of the springs which naturally flowed into the same, but which, on account of the tunnels were discharged into the stream at a point different from the natural flow."

It may be contended by our opponents that the language quoted from the opinion is dictum. If so, the query arises, was it dictum which limited the scope and meaning of the opinion as contended in the Sullivan case, or was it dictum pure and simple entirely outside of the case? We contend it was not outside of the case. If a party in the exercise of dominion over his own real estate cannot, in the proper exercise of such dominion, avoid injuring his neighbor whose rights are involved it

may be a case of *damnum abseque injuria*. But if he can exercise such dominion in the use of his property as not to injure his neighbor, it is his duty to do so under the doctrine of "reasonable use."

The language quoted from the unanimous opinion of the court clearly implies that in such a case the owner of the tunnel cannot, in equity, claim the water as against a prior appropriator of the stream. The excerpt quoted clearly shows that the Utah Supreme Court had no sympathy with such claim as is now relied on by the petitioner in the present case.

In the second Herriman appeal, 25 Utah 96, the findings of the trial court were to the effect that the driving of the tunnel did not dry up or diminish the flow of any spring or springs in Butterfield canyon, or any spring or springs flowing into Butterfield creek, or any tributary thereof. The Supreme Court arrived at the conclusions that this finding was supported by the evidence. This finding alone afforded ample grounds for a decision of the question before the court. The court, however, speaking through Mr. Justice Bartch, enters upon an elaborate discussion as to the doctrine of the common law in relation to percolating waters. No argument is made, and no discussion is had as to the fundamental differences between the doctrine of the common law and the law of appropriation as applicable to regions where irrigation is indispensable. No consideration whatever appears to have been given to these vital distinctions, but the case is treated exactly the same as if it had arisen between adjacent proprietors, each claiming under the common

law, the waters percolating in his land. Mr. Justice Bartch was of the opinion that plaintiff was not entitled to any relief. Mr. Chief Justice Miner, however, held that the evidence tended to show that some of the waters of the creek were diminished by defendant's tunnel, and that such water was not percolating water, but water flowing in definite channels. He concluded that fifty per cent of the water flowing from the tunnel was water to which the plaintiff was entitled and that the decree which had awarded all the water to respondents should be modified accordingly. Mr. Justice Baskin, adhering to his view as expressed on the former appeal that the tunnels as driven into the mountains cut the underground channels which dried up the spring tributary to the creek, concurred with Chief Justice Miner that at least one-half of the water which flows from the tunnel into Butterfield creek is drawn from the underground channels of the springs which were dried up, and also concurred in a modification of the decree. Mr. Justice Baskin then enters upon a discussion of the reasonable use or "American doctrine," to which we have referred, and cites many authorities in support thereof, all of which tended to show that the grounds upon which defendants claimed the water were untenable and without merit.

The Herriman cases, we assume, are the cases upon which petitioner most implicitly relies in support of its claims to the waters of the tunnel. If it can derive any comfort from these it is more easily satisfied than litigants are ordinarily. The cases were illy considered. They went outside of what was necessary to the decision

of a case which generally leads to confusion, especially in cases arising thereafter. The underlying principle of the law of appropriation, its distinctive features as contradistinguished from the comomn law doctrine of percolating water, were not considered at all. Each member of the court had an opinion of his own and neither agreed with the other. If such a decision can constitute a rule of property binding on any court we will be advised to that effect for the first time in the case at bar.

See Katz vs. Walkinshaw, *supra*, at page 771.

THE GARNES-ROLLINS CASE.

Garnes vs. Rollins is reported in 41 Utah at page 260. The syllabus, consisting of one paragraph only, states the whole case and shows conclusively that it has no bearing upon the question presented in this petition. It reads:

> "Where an owner of land collected into a pond thereon water from springs, seepage, percolation, and an artesian well sunk on his land, and by ditches conveyed the water to different parts of his land for irrigation, and constructed an artificial watercourse through which water was conveyed into a ditch running along the side of an easement and right of way of another, who, during the irrigation season of each year for the last nine years, used the water in irrigating his land, the latter did not acquire any prescriptive or vested right in the water as against the owner *without reference to the question as to whether the common law rule that water percolating through the soil without any definite channel is a part of the freehold should be modified*, and the owner had the absolute right to intercept the water before it left his premises." (Italics ours.)

Petitioner derives comfort, not from what the case really was, but from what the court said in the course of its opinion. After quoting from a California case the old doctrine of the common law the court, at page 266, says:

> "The doctrine thus announced was reaffirmed by the California court in the case of Southern P. R. Co. vs. Dufour, 95 Cal. 615, 30 Pac. 783, 19 L. R. A. 92; Gould vs. Eaton, 111 Cal. 641, 44 Pac. 319, 52 Am. St. Rep. 200, and Los Angeles vs. Pomeroy, 124 Cal. 597, 57 Pac. 585, and has generally been accepted in that state until comparatively recent date. In this jurisdiction the common law doctrine as declared by the Supreme Court of California in the case above mentioned, in so far as applicable to the questions litigated in which was involved the right of the owner of the land to percolating water, found therein, has been adhered to and followed." (Sullivan vs. Mining Co., 11 Utah 438, 40 Pac. 709, 30 L. R. A. 186; Crescent Min. Co. vs. Silver King Min. Co., 17 Utah 444, 54 Pac. 244, 70 Am. St. Rep. 810; Willow Creek Irr. Co. vs. Michaelson, 21 Utah 248, 60 Pac. 943, 51 L. R. A. 280, 81 Am. St. Rep. 687; Herriman Irr. Co. vs. Keel, 25 Utah 96, 69 Pac. 719; Fayter vs. North, 30 Utah 156, 83 Pac. 742, 6 L. R. A. (N. S. 410.)

We have already reviewed the Utah cases cited by the distinguished Justice who wrote the opinion and feel justified in asserting that the statement made in the excerpt quoted is not wholly justified by the facts. Except as to dictum and statements made outside of the issues in the cases referred to there is little or nothing to justify the conclusion that the Utah court has followed the old California cases to which reference was made. For instance, in the Dufour case from California, cited in the

excerpt, the court held that percolating water under the California statute, Sec. 1410 of the civil code, was not the subject of appropriation, while in the Sullivan case, *supra,* the Utah court held that under the law of Congress and the statutes of Utah, it was the subect of appropriation. The differences of opinion in the two cases are easily reconciled when we come to consider the difference between the statutes under which the respective cases were decided. The California statute as to appropriation of water reads as follows: "The right to the use of *running water flowing in a river or stream or down a canyon or ravine may be acquired by appropriation.*" (Italics ourts.) The Utah statute heretofore quoted in connection with our review of the Sullivan case says: "Whenever any person or persons shall have taken, diverted and used any of the waters of any natural stream, water course, lake, or spring *or other natural source of supply.*" (Italics ours.) In the Sullivan case, *under the Utah statute,* the point was made and decided that even percolating water might be a "natural source of supply," and subect to appropriation. In the Dufour case, *under the California statute,* it was held percolating water was not the subject of appropriation.

It is extremely regretable that loose improvident expressions made by courts are afterwards sometimes quoted and used as of binding effect, when in fact they are in no sense authoritative and ought never to be used in an attempt to influence the judicial mind.

THE ROBERTS-GRIBBLE CASE.

*Roberts* vs. *Gribble,* 43 Utah 411, is also relied on by petitioner. The trial court refers to it and treats it as controlled by the decision in Garnes vs. Rollins. The Supreme Court of Utah, in a recent case since the present controversy arose, has expressly limited the effect of the Roberts-Gribble case to the doctrine enunciated in the Garnes-Roberts case. Stookey vs. Green, —— Utah ——, 178 Pac., at page 589. It would serve no useful purpose to review at length either the Garnes-Rollins case or the Roberts-Gribble case. They both proceed upon the theory that water arising from the irrigation of lands in the vicinity is not the subject of appropriation. Even this view, however, is modified by a still more recent case, reference to which will conclude our review of the Utah cases.

THE RASMUSSEN CASE.

*Rassmussen* vs. *Moroni Irrigation Company* is the most recent Utah case involving the right to percolating waters. It is reported in 189 Pac. 572; advance sheets June 7, 1920.

Rassmussen was the owner of ten acres of land and lessee of other lands in Sanpete Valley, Utah, through which valley flows the Sanpitch River. He was the owner of a water right from one of the tributaries of the river by means of which he irrigated the ten-acre tract. When he commenced irrigating the land it was dry and arid, but in the course of time it became wet and swampy on account of the irrigation of other lands above him in the same vicinity. These lands were also irrigated by a tri-

butary of the river. The lands were so situated that the run-off, drainage and seepage from irrigation found their way into the river and became a part thereof. These waters, so co-mingled with the other waters of the river, were appropriated and diverted by other persons situated below. Rassmussen conceived the idea of draining his ten-acre tract of land and conveying the water so collected into the river, and diverting therefrom an equivalent quantity, and using it for the irrigation of his other land. The other appropriators of water from the river disputed his right to so divert and use the water, and Rassmussen brought suit to quiet his title to the water in question. The trial court found in favor of the defendants, and the Supreme Court affirmed the judgment.

This case speaks for itself. Comment is unnecessary. It demonstrates beyond all possible doubt that the Utah Supreme Court is committed to the doctrine that the prior appropriator of water is entitled thereto as against the owner of the land, whose only claim is that it is found in his land in a state of percolation.

The Circuit Court of Appeals, in deciding the case at bar, after a brief reference to the earlier decisions of the Utah Supreme Court, and declaring them to be inharmonious as far as the question at issue is concerned, finally reached the cases of Stookey vs. Green and Rassmussen vs. Moroni Irrigation Company, to which we have referred. These the court considered as controlling because they are the most recent expressions of the views of the Utah court concerning the question to be determined. The Circuit Court of Appeals in its opinion

quotes at considerable length from the opinions of these two cases, especially the Rasmussen case, and finally reaches the conclusion that respondents are entitled to the water in controversy. This has drawn considerable fire from the guns of petitioner's counsel, and hence the Stookey case and Rasmussen case have been subjected to a most rigid analysis with a view of distinguishing them from the instant case. As regards the Stookey case the objections of counsel seem to be, (1) that the opinion was written by Mr. Justice Thurman, formerly one of counsel for respondents at the first trial of the case; (2) that the case decides nothing; (3) that the opinion as to questions of law is dictum; and (4) that in any event it does not conflict with former decisions of the court upholding the common law doctrine concerning the ownership of percolating waters. If the criticism of the opinion had stopped at that point we would have considered it as a somewhat ingenious disposition of the case, notwithstanding our minds may have been left in doubt as to the real objection to Mr. Justice Thurman's writing a few paragraphs of harmless, ineffectual, nondescript *obiter dictum*. But counsel's brief does not stop at the point referred to. It goes into the very middle of a definite concrete proposition of law, advanced in the opinion, and by a process of garbling hitherto unparalleled, proceeds to quote from the opinion, at page 588, the following sentence:

> "If it is private land and the water is percolating, as known and understood at the common law,

then it is not the subject of appropriation as against the owner of the land."

We have only to request the court to read what immediately precedes the excerpt quoted to demonstrate the unfairness of counsel's arguments. We commend the reading of the opinion as a whole, and while we made only a brief reference to it in our brief filed in the Court of Appeals, we regard the case as of the first importance, for, as appears on the same page last referred to, the opinion undertakes to state just what the law was, as declared by the court in decisions rendered prior to that time.

However, it is the Rasmussen case that in a one-sided manner receives the most rigid analysis, and from which the most copious excerpts are quoted. Every possible passage that can in any sense be regarded as a limitation is quoted in petitioner's brief, while those parts which express the underlying broad principle upon which the case was decided, are entirely disregarded. We think we make this statement advisedly, broad as it may seem to be. At page 557 of the report referred to, the opinion reads:

> "The principle we invoke and seek to enforce in this case is so well stated by the author in 2 Kinney, Irr. and Water Rights, at sections 1193 and 1194, that we take the liberty of quoting somewhat at length from the latter section. After referring to the fact that there are different classes of seepage and percolating waters, and that the courts, in the arid region where the right to appropriate and to divert water for beneficial pur-

poses from the streams exists, are recognizing the different classes of such waters, the author says:

"'It was not until the more recent scientific investigations, before mentioned, as to the movements of underground waters through the soil, that these percolating waters tributary to surface waters were recognized as belonging to any particular class, or that any rights could be acquired in them other than the rights which could be acquired to the soil itself, through which they found their way, of which soil, under the prevailing common law rule, they were considered component parts. But, by these geological and topographical investigations made by the government and others, it has been proven in many instances that waters percolating through the soil of watersheds were not only the sources of supply, but the only source of supply of certain streams and other surface bodies of water. It being proven absolutely that these percolating waters physically are directly tributary to these streams, the law has kept pace with these scientific investigations proving this fact; and therefore it follows that in law they should be, and in many jurisdictions are, dealt with and treated as tributary waters. *And, where rights of the stream itself have been once acquired, by appropriation or otherwise, it is unlawful for persons owning land bordering on the stream to intercept the waters percolating through them on their way to the stream, and apply it to any use other than its reasonable use upon the land upon which it is taken, if he thereby diminishes the flow of the stream to the damage of those having rights therein.* Therefore this rule modifies the common law rule that the owner of the land is also the owner of all the water found percolating as a part of the soil itself, and that he may use and dispose of it as he sees fit, to the extent that he may

only use these waters so percolating through his land, subject: First, to the rights of others to the water flowing in the stream which this water augments, upon the same principle as though this water was a part of the stream itself. * * *,'' (Italics ours.)

As if to further emphasize the principle underlying the decision, at page 578 we find the following statement, tersely expressed, but conveying to the mind of the reader the fundamental idea of the case as it appeared to the distinguished writer of the opinion:

> ''The controlling question always is: Was the water in question appropriated and put to a beneficial use by others before the interception and attempted appropriation thereof by the landowner?''

These two excerpts, quoted from the opinion in the Rasmussen case, apply with exactly the same force and effect to the facts in the case at bar as they did to the facts in the Rasmussen case. If they were controlling in that case, they are controlling in this.

The Rasmussen case is a direct and complete overturning of the common law, if it ever did exist in Utah, concerning the ownership of percolating waters. The Circuit Court of Appeals in part quoted and relied on the excerpts we have quoted as a fundamental basis of the decision rendered by the Utah court, and did not refer to the so-called limitations relied on by petitioner. The Circuit Court of Appeals did well in so doing. When an appellate court has declared in positive unequivocal language the broad principle upon which it decides a

case, such decision cannot be limited so as to exclude cases that fall within the principle of the decision rendered. As well might the puny arm of man try to prevent the ever recurring rise and fall of the ocean tides.

If the Utah Supreme Court was charged with the duty of deciding this case, there can be no doubt from the cases we have reviewed what its decision would be. There is no possible escape from the conclusion that its decision would be in favor of respondents' contention. *The Mountain Lake case and other cases cited in connection therewith would be decisive of the question of burden of proof. The Rasmussen case alone would be decisive as to the ownership of the water in dispute.* The Circuit Court of Appeals was fully warranted in its conclusion that under the decisions of the Utah Supreme Court, judgment should be entered for respondents.

In view of the foregoing we respectfully submit that there is absolutely no merit in petitioner's contention that the decision of the Circuit Court of Appeals should be reviewed by this court on the theory that that decision creates "an unseemly conflict on a rule of property between the national and state courts" and that such review is necessary "to correct the conflict by the federal courts with the statutory law of Utah." The decision of the Circuit Court of Appeals is in harmony with the rule emphatically laid down by the Supreme Court of the State of Utah, and is also in complete harmony with the statutory law of Utah, as the same has been construed by the Supreme Court of that state. Indeed, the rule contended for by petitioner would not only be in conflict

with the decisions of the Supreme Court of Utah, and with the statutory law of that state, as the same has been construed by said decisions, but it would be in conflict with the great weight of modern authority and would be subversive of the best interests of the State of Utah and all other arid states.

In concluding this portion of our brief we again refer to the case of Garns vs. Rollins, supra, one of the cases relied on by petitioner, in which Mr. Justice McCarty, speaking for the court in discussing this question, after stating the old common law rule, at page 266 says:

> "The general trend, however, of recent decisions in many of the states of the Union, is away from the English rule, or common law doctrine of unqualified and absolute right of a land owner to intercept and draw from his land the percolating waters therein. In these later cases the right of a land owner to subterranean waters percolating through his own and his neighbor's land, and which is a common source of supply for the land of two or more of them, is limited to a reasonable and beneficial use of the water upon the land, or to some useful purpose connected with its occupation and enjoyment."

Then follows a citation of numerous authorities with pertinent quotations therefrom, all tending to support the doctrine that the right of the owner of land to the water percolating therein is limited to a reasonable and beneficial use of the waters upon the land itself or to some useful purpose connected with its occupation and enjoyment. This doctrine is now so prevalent in this country as to be designated "The American doctrine." It is sometimes called the "doctrine of reasonable use."

The following are some of the many authorities in which the doctrine, by whatever name, is vigorously maintained:

Meeker vs. East Orange, supra;

Katz vs. Walkinshaw, supra;

McClintock vs. Hudson, 141 Cal. 275; 74 Pac. 849;

Cohen vs. LaCanada Water Company, 142 Cal. 437; 76 Pac. 47;

Montecito etc. Co. vs. Santa Barbara, 144 Cal. 578; 77 Pac. 1113;

Burr vs. McClay, 154 Cal. 428; 98 Pac. 260; see also 116 Pac. 715;

Barton vs. Riverside Water Co., 155 Cal. 509; 101 Pac. 790; 23 L. R. A. (N. S.) 331;

Hudson vs. Dailey, 156 Cal. 617; 105 Pac. 748;

Los Angeles vs. Hunter, 156 Cal. 603; 105 Pac. 755;

Miller vs. Bay City Water Co., 157 Cal. 256; 107 Pac. 115; 27 L. R. A. (N. S.) 772;

Ex Parte Elam, 6 Cal. App. 233; 91 Pac. 811;

Comstock vs. Ramsey, (Colo.) 133 Pac. 1107;

McClellan vs. Hurdle, (Colo.) 33 Pac. 280;

Pence vs. Carney, (W. Va.) 52 S. E. 702; 6 L. R. A. (N. S.) 267;

Smith vs. City of Brooklyn, 18 N. Y. App. Div. 340; 46 N. Y. Sup. 141; 160 N. Y. 357; 54 N. E. 787; 45 L. R. A. 664;

Forbell vs. New York, 164 N. Y. 522; 79 Am. St. Rep. 666; 58 N. E. 644; 51 L. R. A. 695;

Bassett vs. Salisbury, 43 N. H. 569; 82 Am. Dec. 179;

Swett vs. Cuts, 50 N. H.; 9 Am. Rep. 276;

Willis vs. Perry, 92 Iowa 297; 26 L. R. A. 124; 60 N. W. 727;

Stillwater Water Company vs. Farmer, 89 Minn. 58; 93 N. W. 907; 99 Am. St. Rep. 541;

East vs. Houston & T. C. R. Company, (Tex. Civ. App.) 77 S. W. 646;

Barclay vs. Abraham, 121 Iowa 619; 96 N. W. 1080; 100 Am. St. Rep. 365;

Thompson vs. Improvement Co., 56 N. H. 545;

Springfield Waterworks Co. vs. Jenkins, 62 Mo. App. 74;

Burke vs. Smith, 69 Mich. 380; 8 L. R. A. 184; 37 N. W. 838;

Erickson vs. Crookston etc. Co., 100 Minn. 481; 8 L. R. A. (N. S.) 1250; 111 N. W. 391; 10 A. & E. Ann. cases 843; 105 Minn. 182; 17 L. R. A. (N. S.) 650; 117 N. W. 435.

## III.

The third ground on which petitioner bases its application for a writ of certiorari is discussed in its brief, commencing on page 51. This ground, stated in counsel's own language, is as follows:

> "The decision involves a question of great public concern to the United States government, to people of the State of Utah, and other mineral states, as it will result in prohibiting the opening and working of unappropriated mineral lands, title to which still remains in the United States government, as well as mineral lands under private control, and may result in the closing of some of the largest mining properties now operating in the State of Utah, to the great detriment of both public and private concerns."

There is only one thing the matter with this proposition, and that is, that it has absolutely no foundation in fact. Counsel's assumed fears are wholly groundless. Even a casual reading of the decision of the Circuit Court of Appeals will show that there is not a single thought in that decision that furnishes the slightest excuse for the remarkable statement quoted above from counsel's petition. The statement is a "man of straw," and nothing more. After advancing this wholly imaginary ground, counsel proceeds to support it by quotations from various decisions, but the language quoted in each instance was used by the various courts in discussing claims of litigants, and not in discussing the effect of decisions of courts of the character of the decision in the case at bar. Even a superficial examination of the decision of the Circuit Court of Appeals, which counsel

seeks to overturn in this proceeding, will show at a glance that it furnishes no excuse for bringing these quotations into a case of this kind. It requires a very vivid imagination indeed to seek to apply any of the excerpts quoted to the decision in question. The cases, from which counsel quotes, are discussed at pp. 18-41 of this brief to which we refer without repeating what is there said.

Let us analyze counsel's alleged ground, and compare it with the decision sought to be overturned.

Referring to the decision, counsel says:

> "It will result in prohibiting the opening and working of unappropriated mineral lands, title to which still remains in the United States government, as well as mineral lands under private control."

In support of this proposition counsel argues, on pages 53-63 of his brief, that if the decision is permitted to stand the development of the mineral lands of the United States, as well as those of private persons, would be prevented by injunction. Petitioner's position is thus stated on page 61 of its brief:

> "If the owner of the land, valuable only for the mineral it contains, or is supposed to contain, cannot safely prospect the ground by driving tunnels therein without being harrassed by the fear that if water is developed in the tunnel he may have to answer in damages or be injured from proceeding further because of the claim that the waters encountered are waters that fed springs that furnished water to a stream, the waters of which had been appropriated, then mining will become more hazardous and precarious than it is now."

Now, in all candor, we ask, where is there anything in the decision of the Circuit Court of Appeals to authorize such a conclusion? We respectfully submit that the alleged "ground for a writ of certiorari," which we are now discussing is simply an attempt on petitioner's part to befog the issues by injecting into the discussion matters that are irrelevant and immaterial. Respondents' position here is the same as it was in the Circuit Court of Appeals, and that is best stated by quoting from our brief in that court, as follows:

> "It has never been our position that appellee had no right to make a reasonable use of its land. In this case we concede it had the right to construct its tunnel for the very purposes declared by it in every argument thus far made. It had the right to prosecute the work for the purpose of draining its mine, developing ore, transporting material from one place to another, or any other purpose connected with the matter of the land itself. As far as the case at bar is concerned, we concede that all of these purposes were legitimate, and the use of the land was a reasonable use, but at this point our concessions end. Thus far we have no grounds for a complaint. When, however, appellee sets up a claim to the water which flows out of the tunnel, and threatens to convey it away to distant lands, and deprive appellant of the use thereof—a use which appellants have had unmolested for more than a quarter of a century before this action was commenced—this we contend is an unreasonable use, and one not tolerated under the reasonable use rule, whatever may have been the old rule of common law."

The foregoing quotation accurately stated our contention in the court below, and we do not care to deviate

from that position here. The court will bear in mind that the petitioner in this case is a corporation *organized to mine ore, not to traffic in waters.* The purpose of its organization was to own and develop mining properties for the purpose of extracting ore therefrom and selling same, not to make merchandise of any water that it might encounter in the carrying on of its mining operations.

The Circuit Court of Appeals in its decision, which is sought to be overturned here, made the following findings:—(see the opinion of the court as the same is set forth on page 478 of the transcript).

> "Adopting this rule the evidence warrants findings, *and we so find,* that since the construction of the tunnel, by the plaintiff, the water in Snake Creek has been materially lessened to an extent that there is not sufficient water in the creek to enable the stockholders of the defendant company to irrigate their lands so as to be able to cultivate their lands, which are all agricultural, unless permitted to use the surplus water flowing into the creek from plaintiff's tunnel; *that the water flowing in the creek from that tunnel is not used nor necessary to enable the plaintiff to operate its mine and which under its charter it is authorized to carry on;* that the water in controversy is sold by it to another irrigation district formed years after the defendants had appropriated the water in Snake Creek; *that the waters of the tunnel are percolating waters and from seepage and which before the construction of the tunnel found their way through the soil and rocks to springs flowing into Snake Creek,* and had been appropriated and were used by the defendants for irrigating their lands, and that without them their lands cannot be cultivated; that these waters with the water obtained by them from Snake Creek and the Ontario

> Tunnel, enabled them to raise crops practically every year, but that the plaintiff's tunnel intercepted considerable of this water, thereby diminishing the water in the creek and unless permitted to use the water flowing from the tunnel into the creek, their lands cannot be cultivated. The evidence fails to establish that the water which passes into the tunnel comes from underground channels." (Italics ours.)

After making the findings above quoted, the court states the real issue to be decided, in the following language:

> "The real issue involved is whether these waters belong to the owner of the soil in which they are found, in this instance the plaintiff, regardless of where they come from."

The court then discusses the so-called common law, or English Rule, as to property rights in percolating underground water, and rejects the same, declaring in favor of the doctrine of "reasonable user," as will appear from the following quotation from the opinion:

> "The rule generally adopted by, not only the courts of the arid states, but by most of the American courts, so that it may be said to be the American, as distinguished from the English rule, is that, while the owner of the land is entitled to appropriate subterranean or other waters accumulating on his land, which thereby become a part of the realty, *he cannot extract and appropriate them in excess of a reasonable and beneficial use of the land, especially if the exercise of such use in excess of the reasonable and beneficial use is injurious to others, who have substantial rights to the water.*" (Italics ours.)
>
> (Citing Meeker vs. City of East Orange, 77 N. J. L. 723; Smith vs. Brooklyn, 18 N. Y. App. Div.

340, aff. 160 N. Y. 359; Tarbell vs. New York, 164 N. Y. 522; Burnett vs. Salisbury, 43 N. H. 569; Willis vs. Perry, 92 Ia. 297; Stillwater Water Co. vs. Farmer, 89 Minn. 58.)

The court then proceeds to discuss further the rulings of the Supreme Court of Utah, which we have discussed in another portion of this brief, and to which we now refer the court in this connection. (See pp. 18-42 herein.) The court concludes its opinion with the following (see transcript, page 483):

> "The water in controversy is unconnected with plaintiff's use of the tunnel, in fact, it is not used for the plaintiff's own use, its business being mining and not farming, and therefore it cannot be said that selling it is a reasonable, or so far as its business is affected, a beneficial use. See Mr. Justice Baskin's concurring opinion in Herriman Irr. Co. vs. Keel, 25 Utah 96, 124, on that point. To sell it to other irrigation companies cannot be said to be a reasonable and beneficial use for its business, when the effect of it is, as the evidence in the case at bar clearly establishes that, it is destructive of defendant's rights to use the water of Snake Creek, which they had, twenty-five years before the driving of the tunnel by the plaintiff, appropriated, and without it their lands would become absolutely valueless."

In view of the foregoing we confess our inability to see either reason or logic in petitioner's contention that the decision above quoted would destroy or impair the mining industry or that it would injure it in the slightest degree. At this point we ask, "How can such a decision prohibit the opening and working of unappropriated mineral lands, or mineral lands under private control?"

*The effect of the decision not only authorizes, but encourages the development of mineral lands, public or private, to the fullest extent, and it specifically refuses to enjoin such development. It even goes further, as it awards to the mining company unlimited right to the use of all the water it can use in connection with its property, or in its mining operations.* This is but a recognition of the doctrine of "reasonable user," or, in other words, the American Rule, which has been adopted in practically every case where the matter has come squarely before American courts. (See cases cited on p... of this brief.)

We are not unmindful of the importance of the mining industry, and if it would serve any useful purpose we could also fill a book with arguments as to the importance of the agricultural industry. We could also consume a great deal of space in quoting history and statistics showing the growth and development of the great arid west, and how the very existence of farms, villages and cities are dependent upon water from mountain streams for irrigation, and for culinary purposes. We could show beyond any controversy that Denver, Salt Lake City, and hundreds of other cities in the arid west are absolutely dependent for their water supply, upon streams such as Snake Creek, flowing from adjacent canyons, and that to adopt the common law rule and thus permit corporations or individuals to tunnel into the watersheds containing the water, without which these cities could not exist, and intercept the same and make merchandise of it, trafficking in it for gain in matters not connected in the remotest degree with mining operations,

would work an irreparable injury to all said communities. But all of such argument is irrelevant and outside the issues, as is all of the discussion of counsel for petitioner under the alleged third ground for a writ, and all matters discussed under subdivision II of petitioner's brief on pp. 51-63. The adoption of the "reasonable user," or American Rule, will not retard the development of mines in the slightest degree. Legitimate mining operations can be carried on without hindrance. Tunnels can be run at will and every ounce of the ore can be extracted from the hills. The mines can be drained and every interest of the miner protected, and at the same time, after the miner has used all of the waters required in his operations, the balance can be permitted to flow down to the communities which have heretofore used it, and the agriculturist can be permitted to carry on his industry the same as before, and no one will be injured. Therefore, we feel justified in repeating that the alleged ground under discussion in this section of the brief, is merely a "man of straw" and that the arguments in support of the same are without merit, and do not furnish a sufficient reason, or any reason, for this court to take jurisdiction and review the decision of the Circuit Court of Appeals.

At page 56 of petitioner's brief Exhibit 173 is reproduced and an extended argument is built up around this exhibit, concluding with this question on page 58:

> "If the decision of the Circuit Court of Appeals is correct, what is to prevent these defendants from putting a stop to the further extension of

mining in the direction of Clayton Peak by injunction proceedings?"

*The whole answer to this question is that the Circuit Court of Appeals, in its decision, which by the way is final, refused to enjoin the further extension of petitioner's tunnel,* thus, instead of "putting a stop to the further extension of mining," it affirms that right. When litigants frame an issue which issue is decided in favor of the contention of the plaintiff in the lower court (in this case against the granting of an injunction), then on appeal to the Circuit Court of Appeals the contention of plaintiff as to that issue is again sustained, by a decision which is final, but the case is decided against it on another issue, it is difficult to understand, how, under such circumstances, such a plaintiff having its contention twice sustained, can come into this court and argue that the decision should be overturned and *advance as a reason, that to permit such a decision to stand would be to constantly "menace the mining industry by possibility of injunctions."*

But counsel asks, "What if the tunnel had been driven from the other side of the mountain so that the waters could not be returned to Snake Creek?" It ought to be sufficient answer to say that no such question is involved in this litigation and that the courts will not occupy their time in deciding *what might happen in any hypothetical case.* And while we do not feel it incumbent upon us to undertake to answer questions which can shed no possible light upon the issues to be determined, we, nevertheless, will endeavor to answer the one re-

ferred to, sincerely hoping that it may make our position in the case before us more clear to the mind of the court.

If petitioner, or any other mining company, had driven a tunnel from the other side of the mountain where the waters therefrom could not be returned to the stream for use by respondents, *and that was the only means by which it could drain or operate its mines, develop its ore, or provide means of transporting ore or other minerals or do any other thing consistent with its mining operations,* we are not prepared to say that in such a case it would not be a case of *damnum absque injuria.* If any inference whatever is to be drawn at all on that question from the decision sought to be reviewed in this proceeding it would unquestionably be that in such a case it would be held that the use to which the mining company put its property was a reasonable use. The principle underlying the "reasonable user" rule is that the law recognizes the right of every property owner to make the greatest possible use of his property consistent with the rights of his neighbor. But every proprietor in the use of his own property is burdened with the obligation of avoiding injury to his neighbor if he can do so without great sacrifice or inconvenience. Therefore, in our view, if a mining company in driving its tunnel for the purposes mentioned, could with equal convenience have driven it from some point where the water could be restored to petitioners above their point of diversion, then the mining company would not be justified in driving its tunnel at some other point. The

same answer in principle might be given to practically every other irrelevant question which petitioner's counsel have seen fit to propound in connection with this branch of the case.

In view of the ample and proper protection given to the mining company by the decision of the Circuit Court of Appeals in permitting it to continue to use its property by extending the tunnel in question and to use it for every purpose for which it was originally designed by the mining company itself, according to the testimony of its own officials at the trial (see Tr. p. 306), and in establishing and confirming its right to use freely and without restraint all of the water it could use in its mining operations, we confess our inability to understand how counsel can contend that such a decision is "a menace to the mining industry."

The language of Mr. Justice Pitney in adopting the "reasonable user" or American Rule, in the case of Meeker vs. City of East Orange, already referred to, cited with approval by the Circuit Court of Appeals in the case at bar, should forever set at rest counsel's fears. We repeat the quotation from the decision of the New Jersey court:

> "Upon the whole, we are convinced not only that the authority of the English cases is greatly weakened by the trend of modern decisions in this country, but that the reasoning upon which the doctrine of 'reasonable user' rests, is better supported upon general principles of law, and more in consonance with natural justice and equity. We, therefore, adopt the latter doctrine. This does not prevent the proper user by any landowner of the percolating waters subjacent to his soil in agricultural, manufacturing, irrigation or

otherwise, *nor does it prevent any reasonable development of his land by mining or the like,* although the underground water of neighboring proprietors may thus be interferred with, or diverted; but it does prevent withdrawal of underground waters for distribution or sale for uses not connected with any beneficial ownership or enjoyment of the land whence they are taken, if it thereby result that the owner of adjacent or neighboring land is interfered with in his right to the reasonable user of subsurface water upon his land, or if his wells, springs or streams are thereby materially diminished in flow or his land is rendered so arid as to be less valuable for agricultural, pasturage or other legitimate uses."

## IV.

### BURDEN OF PROOF.

In the third subdivision of petitioner's brief counsel discuss the fourth alleged ground why this court should review the decision of the Circuit Court of Appeals, that is, the claim that the Circuit Court erred in holding that the burden of proof was on petitioner (plaintiff below).

In disposing of that feature of the case the Circuit Court of Appeals reached the same conclusions as did the trial court, to-wit, that the burden of proof was on petitioner, quoting with approval the language of the Supreme Court of Utah hereinafter set forth. (See opinion on Tr. pp. 447-478.) It is true as we have hereinbefore stated (p. . .) that the Circuit Court overlooked the fact that the trial court had also reached that same conclusion, but we fail to see that petitioner can get any comfort out of that oversight inasmuch as both courts reached the same conclusion—the trial court after hav-

ing become familiar during the trial with the physical conditions existing in the vicinity of the tunnel, and both courts having thoroughly examined the law on the question as the same was applicable to the facts in the case.

Both courts applied the rule enunciated by the Supreme Court of Utah in the case of Mountain Lake Mining Company vs. Midway Irrigation Company, 47 Utah 346.

The Mountain Lake case was similar in many respects, as far as physical conditions are concerned, to the case now before us. In that case the plaintiff, a mining company, brought an action against the same parties defending in the present case to quiet its title to the waters of a tunnel driven by it in a similar manner into the mountain where Snake Creek has its source and in close proximity thereto. The plaintiff in that case claimed the water as "developed water," which had never before been appropriated. The defendants defended on substantially the same grounds as they defend in the case at bar. The principal question of law determined by the court was as to the burden of proof. The majority of the court held that the burden of proof was upon the plaintiff *not only because of the form and nature of the pleadings, as counsel contends, but "because of the facts and circumstances of the case."* The facts and circumstances in the present case are sufficiently similar to the facts and circumstances in the Mountain Lake case to justify the courts below in the present case in adopting the rule therein enunciated.

The court, in the Mountain Lake case, speaking through Mr. Justice McCarty, at page 360 of the report referred to, says:

> "It is a well-recognized rule of law in this arid region, that where, as in the case at bar, a party goes upon a stream, the waters of which have been appropriated and put to a beneficial use by others, and drives a tunnel into the mountain or watershed drained by the stream, and immediately under or in close proximity to the stream collects water which he claims to be developed water, he must make satisfactory proof that such water is in fact 'developed water.' In such case it is immaterial whether the water, when encountered, is flowing in well-defined subterannean channels or is percolating through the soil, gravel, and the fissures and crevices of the rock. In either event, the presumption is, until overcome by satisfactory proof, that the water is tributary to the main stream, and the right to its use is vested in the prior appropriators of the stream."

The court, continuing further upon the question as to the burden of proof, quotes the following from 2 Kinney on Irrigation, Sec. 1206:

> "The burden of proof is upon the one who has discovered certain subterranean water and claiming the same to show that such water is, in fact, 'developed water.' Therefore, whoever asserts that he is entitled to the exclusive use of water by reason of his having discovered and 'developed' the same, must assure the court, by a preponderance of the evidence, that he is not intercepting the tributaries of the main stream or other body to the waters of which others are entitled."

In a separate concurring opinion in the Mountain Lake case, at page 367, Mr. Justice Frick says:

> "While, under the evidence and circumstances of this case, I am forced to believe that, in running the tunnel into the mountain for a distance of over 5,000 feet, the defendants increased the quantity of water at least temporarily, yet I am unable to say, from all the evidence, whether such increase is permanent, or even to say definitely what the amount of the increase was. *The burden was on respondents to show and make evident these things* (italics ours), and I am of the opinion that they have not done so. It is a matter of common knowledge that in this mountainous region the water which percolates into and through the porous soil of the mountains, especially in the higher altitudes, at some time and in some manner finds its way into the mountain streams. Merely to drive a tunnel into a mountain, therefore, into which and from which a considerable quantity of water flows, is not even persuasive evidence that the water thus flowing from such a tunnel is what is termed developed water, within the purview of the law. In order to authorize a finding that the water encountered in such a tunnel is actually developed water, the proof, in my judgment, should be reasonably strong and clear."

Other authorities to the same effect are quoted and cited in the opinion and need not be enumerated here.

It is difficult to controvert the logic of these opinions. A brief statement of the situation ought to convince the court that any other rule would be inequitable, illogical and unjust. The farmer, gardener, and horticulturist locate in the valley in the vicinity of a stream which has its source in the mountains, generally at some considerable distance away. In pursuance of the law of Con-

gress, local laws, and customs prevailing in the community, these persons divert from the stream water sufficient to irrigate their lands and for other beneficial purposes. They are not concerned as to the actual source or sources of the water; all they know is that the water had never before been appropriated, and they rely upon the fundamental law of appropriation—"First in time, first in right." They conduct the water thus diverted upon their farms, gardens and orchards and establish a thriving, prosperous community. Years afterwards the miner located his mining claims on the public domain in the mountains at or near the source of the stream in question. He delves into the earth seeking to unearth the precious metals supposed to exist within his claim and sooner or later deems it necessary to drive a tunnel into the mountain for the purpose of discovering and developing the ore, and also to drain the lower workings of his mine. By the tunnel so constructed he collects the subterranean waters encountered in the prosecution of his work and causes the same to flow out of the tunnel and into the adjacent stream, the waters of which, as heretofore stated, had been previously appropriated. No notice was ever given by the miner of any intention to claim the water thus collected and brought to the surface. The prior appropriators of the stream had never been warned that their rights were in jeopardy. They had no occasion for climbing into the mountains to locate, determine and measure the various tributaries, springs, seeps and other sources of water, for they had no reason whatever to suppose anyone was attempting

to interfere with their appropriations. They go on using the water of the stream just the same as they had always used it from the earliest date of their appropriations. They have suffered no injury, for if the underground sources of their stream were cut off and the courses thereof turned in other directions, it is without injury or damage because the waters of the tunnel are again restored to the stream above their points of diversion. After all this is done the miner for the first time sets up a claim to the water collected by his tunnel and brings his action against the appropriators of the stream to have his title to the water quieted and affirmed. The appropriators answer and claim that the waters of the tunnel are a part of the stream the waters of which were previously appropriated by them. The question arises, "Are the waters of the tunnel 'developed waters,' that is, new water that had never before come to the surface and been appropriated by others, or are they tributaries of the stream the waters of which had all been appropriated?" If the former, there can be no question as between the miner and the appropriators, but that the water belongs to the miner. If the latter, in justice it ought to belong to them who first appropriated and put it to a beneficial use. But this is anticipating. The only question we wish to present in this connection is, upon whom should rest the burden of proof? Should it rest upon the appropriator of the stream who used the water is in the valley far below and who knew nothing of the miner's work or of his intentions respecting the water, or should the burden rest upon the miner who is at or near the

head of the stream, who knows what his own intentions were as to claiming the water, and whose work, coupled with a claim of the water, may in all probability infringe upon the appropriator's prior rights. If the miner intended in the beginning, when he commenced the construction of his tunnel in the immediate vicinity of a stream appropriated by others, to claim the new water developed thereby it certainly and in justice devolved upon him to make such measurements and such examination of the surface stream that had been appropriated as would enable him to determine as his work progressed whether or not he was diminishing the flow of the stream. The circumstances and conditions imposed upon him this duty, and whether he neglected the duty or not, or originally intended to claim the water, he ought, nevertheless, to be charged with the burden of proof when the question becomes material in the trial of the case.

The trial court as well as the Circuit Court of Appeals (Tr. p. 478), in the present case adopted this view and in the light of both reason and authority we have no reasonable doubt as to the correctness of the conclusion reached by both courts.

See also a more recent case, Bastian vs. Nebeker, 49 Utah 390, where the doctrine is reaffirmed.

In view of all of the facts and circumstances in the case, and considering the law as enunciated by the Supreme Court of Utah, as above quoted, we respectfully submit that the Circuit Court of Appeals, in the decision sought to be reviewed by this court, made no error when

it announced the law on this feature of the case in the following language (Tr. 478):

> "This rule seems more rational and logical than the opposite rule, to-wit: that the burden is upon the prior appropriators to show that subterranean waters drawn by another by means of a tunnel from the ground that might have constituted the sources of the stream, were in fact the source thereof. Those who run tunnels into the mountain and gather water in this way, near the sources of streams, have better means of knowledge whether they are gathering water tributary to the streams than to prior appropriators down the streams, who are cultivating their lands and have nothing to do with the driving of such tunnels, and it would be an irrational and burdensome rule, probably destructive of their rights, to require such prior appropriators to establish the fact in the first instance, that the owners of the tunnel intercepted the tributaries to the stream."

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## V.

### THE FACTS.

The last subdivision of petitioner's brief is devoted to a criticism of the decision of the Circuit Court of Appeals on the facts, and the statement is made that the decision "went far beyond any claim made by any of the witnesses of the defendants." Here again we are compelled to differ. It is in effect admitted by the pleadings, and the story runs through the entire record, that without water respondents' land will revert to its desert condition—it will become a barren unproductive waste. Beautiful farms constituting, according to the record ap-

proximately 1,500 acres, built up and made productive by nearly half a century of patient toil and sacrifice, will, without water, become valueless except as a home for the lizard and the rattlesnake; and homes, schools, and churches built in reliance on the supply of water from this watershed, will, to the extent that the water may be removed to the other valley, have to be abandoned, because it is impossible to sustain human life on the arid lands of these valleys without water to irrigate crops. Instead of the decision going "beyond what witnesses claimed," it does not fully grant the relief for which respondents' contended, in that it permits to the fullest extent the continuance of the mining operations, although by so doing, the testimony shows that the date of the commencement of the low water season is advanced about two weeks to the damage of the farmer. This, under the doctrine of "reasonable user," as adopted by the court, is, however, *damnum absque injuria.*

Petitioner's argument on this feature of the case is wholly misleading, as will appear from a comparison of counsels' language with what was actually said by the trial court.

Under subdivision V, page 72, paragraph 2, counsel commences his argument with the following assertion:

> "*The opinion of the lower court clearly demonstrates that the evidence of the plaintiff was considered by him as being more satisfactory and convincing than that of defendants,* and yet, for some unknown reason, the court, acting under 'the rule of burden of proof,' made no finding and arrived at no conclusion on this ultimate fact."

> sume the burden of proof and make good his claim that he has in fact added to the volume of the flow irrespective of the manner in which the issue is raised under the pleading * * * upon the whole case I am of the opinion that plaintiff has failed to sustain the burden of proof upon its claim that the water encountered in its tunnel or any definite part or portion thereof, is new or developed water. * * *"

It will be observed that while purporting in this portion of the brief to discuss the evidence, no evidence is in fact discussed or even referred to. Just an assertion or two, then a few garbled quotations from the opinion of the lower court,—which opinion by the way was to the effect that petitioner had failed in its evidence to sustain the burden cast upon it—then an attempt by innuendo to charge respondents with concealing some evidence, a charge wholly without foundation.

Counsel for petitioner have made a desperate effort to make some capital out of the fact that they asked respondent to produce some alleged "records" and that respondent failed to do so.

Reference to the Transcript discloses the fact that the demand did not cover "*records*" at all, but a lot of alleged "reports," which in their nature, if any such ever existed (which we by no means concede to be a fact), would probably be on loose sheets of paper and would not be preserved in any record. All of the "*records*" of the company in existence were produced. It is a notorious fact that an organization of farmers engaged as they necessarily are in digging a meager existence out of the

soil, maintaining no office, having no clerical help, whose most important officer is a watermaster, would not be very apt to preserve any such "reports," even if they ever had an existence, which we very much doubt. Furthermore, the record shows that respondent had, prior to the commencement of this suit, been engaged in other lawsuits affecting its water rights and if any such "reports" as are referred to ever existed, it is probable they were introduced in evidence in those actions and remained a part of the record therein, available equally to counsel for both parties to this action. The record discloses that when these alleged "records" were called for, the suggestion was made to counsel for petitioner that they examine those files. The record is silent as to whether or not they ever did so. The query arises "Did they find them and did the alleged 'records' fail to sustain counsel's theory of this case?" Moreover, the only "record" called for was the stub books mentioned in paragraph 5, page 75. These tickets (stubs) only show the date when, and the number of hours, each user may take the water out of the ditch for use on his land. In other words, they are what in common parlance are known as "turn slips" fixing the irrigator's turn and the duration of it, according to the number of shares he owns. Only a moment's reflection will convince the court that they could not indicate the "measured quantity," as claimed by counsel, *because they are made out in advance at the beginning of the irrigation season when no finite mind could even estimate with any degree of accuracy the quantity of water that would be available.* What earthly motive respond-

ent would have for refusing to produce such a stub book is beyond our comprehension. There was no reason to conceal such a record and it was not concealed. It simply had fulfilled its purpose and like so much waste paper, been destroyed along with other useless junk. Our learned friends on the other side are sufficiently familiar with the lack of facilities farmer organizations have for preserving such things (if they ever had any existence), and with their well known laxity in such matters, to know of a certainty before any demand was made that the demand could not be met. Why, therefore, seek to draw the inference that there was something that amounted to fraudulent concealment?

In conclusion, we respectfully submit that the writ should be denied because:

1. The common law rule with reference to underground waters, contended for by petitioner, is utterly incompatible with conditions existing not only in Utah, but throughout the United States, and particularly in states depending on water for irrigation.

2. The Supreme Court of the State of Utah is committed to the rule of "reasonable user" known as the American rule.

3. The decision of the Circuit Court of Appeals is in absolute harmony with the latest and best reasoned decisions of the Utah courts. To adopt a contrary rule in the Federal courts would be disastrous.

4. The American rule followed by the Circuit Court of Appeals is better supported upon general principles of law and is more in consonance with natural justice

and equity and is the rule adopted by the best reasoned cases.

5. The facts and the law of this case are not such as to call for the granting of a writ of certiorari and therefore the petition should be denied.

Respectfully submitted,

A. B. IRVINE,
Solicitor for Respondents.

SAM D. THURMAN,
Of Counsel.

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Service of the foregoing brief of respondents acknowledged and copies received this 18th day of April, 1921, and we hereby consent and stipulate that the petition and brief on this matter may be presented to the court on Monday, April 25, 1921, or as soon thereafter as counsel can be heard.

H. R. MACMILLAN,
Solicitor for Petitioner.